Supreme Court, U.S.
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No. 03-1714

In The
Supreme Court of the United States

MICHAEL MINNIS & ASSOCIATES, P.C.,

Petitioner,

v.

KAW NATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of The State Of Oklahoma, Division No. III

PETITION FOR WRIT OF CERTIORARI

MICHAEL MINNIS
Counsel of Record
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
211 N. Robinson, Suite 501
Oklahoma City, OK 73102-7112
(405) 319-3500; Fax (405) 319-3509
E-Mail: mminnis@dsda.com

QUESTIONS PRESENTED FOR REVIEW

1. Under *Citizen Band Potawatomi v. C&L Enterprises*, can a tribal Chairman assert sovereign immunity as a defense to a suit against the tribe based on a contract approved by the governing body of the tribe where:

   a. the Chairman is not a party to the contract or to the suit;

   b. a majority of the governing body of the tribe has admitted that the sums sought are due and owing under the contract and has waived sovereign immunity; and

   c. the tribal Vice Chairman consistent with a resolution adopted by a majority of the governing body of the tribe confesses judgment in open court consistent with state statutes?

2. Does a state appellate court have authority to decide internal tribal affairs contrary to determinations by the Secretary of the Interior:

   a. By recognizing the tribal chairman as being empowered to represent the tribe when the Secretary has determined he has no such authority;

   b. By recognizing persons as valid tribal judges and their orders and opinions as valid when the Secretary has determined that they are not properly seated as tribal judges, that their orders and opinions are not valid, and that the tribal court no longer exists; and

   c. By refusing to recognize actions by the governing majority recognized by the Secretary?

QUESTIONS PRESENTED FOR REVIEW – Continued

3. Consistent with federal Constitutional Due Process, can a state court of appeals, without briefs or argument, affirm an order granting a motion to dismiss filed by a non-party after reversing the basis for the dismissal and converting the motion to summary judgment when the Plaintiff has not been given a fair opportunity to litigate:

a. the issue of sovereign immunity; and

b. the issue of the non-party's standing?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

MICHAEL MINNIS & ASSOCIATIONS, P.C., a professional corporation organized under the laws of the State of Oklahoma;

KAW NATION, a federally-recognized Indian tribe.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Michael Minnis & Associates, P.C. v. Kaw Nation, 2004 OK CIV APP 36, ___ P.3d ___ December 18, 2003). App.1.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Civil Appeals of the State of Oklahoma, Division No. III, entered its Opinion on December 18, 2003. App. 1. Petitioner Michael Minnis & Associates, P.C. ("MM&A") seeks review of that opinion on a writ of certiorari.

On January 7, 2004, MM&A timely filed a petition for rehearing in the Court of Civil Appeals. On January 12, 2004, the Court of Civil Appeals filed an order denying the petition for rehearing. App. 17.

On January 30, 2004, MM&A timely filed a petition for certiorari with the Oklahoma Supreme Court. On March 29, 2004, the Oklahoma Supreme Court filed an order denying the petition for certiorari. App. 18.

The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.1 of this Court. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the final judgment of a state court of appeals in which a decision could be had.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States,

Article 1, § 8. Indian Commerce Clause.

Amendment XIV, § 1. Due Process Clause.

STATEMENT OF THE CASE

The Petitioner Michael Minnis & Associates, P.C. ("MM&A") is a Professional Corporation organized under Oklahoma law engaged in providing professional legal services. The Respondent is the Kaw Nation, a federally-recognized Indian tribe.

On January 12, 2002, MM&A was engaged as General Counsel to the Kaw Nation under a written contract approved by Kaw Nation Executive Council Resolution 02-07. This resolution is Exhibit B to the Petition. App. 32-33. The Kaw Nation Constitution states that the Executive Council "shall have the authority to act in and on all matters and subjects upon which the Tribe is empowered to act, now or in the future" and is specifically given the power "To employ legal counsel, the choice of counsel and fixing of fees." KAW NATION CONST. art. II, § 4(a) and 4(a)(3).

Consistent with its contract, MM&A provided legal services to the Kaw Nation who paid monthly for those services until the election of Guy Munroe as Chairman in September of 2002. Since his election, the "Executive Council has consistently directed Chairman Guy Munroe to pay said invoices [those submitted by MM&A], but he

has wrongfully refused to make such payments in violation of the Kaw Nation Constitution, Executive Council directions, and the Kaw Nation contract with Michael Minnis & Associates, P.C." App. 39 (last whereas clause).

Thus, on December 12, 2003, the Kaw Nation Executive Council adopted Resolution 02-98 "explicitly waiving sovereign immunity as to suit" and authorizing MM&A to bring suit in Oklahoma County District Court to recover for the services that MM&A had rendered to the Kaw Nation under the contract. A copy of this resolution is Exhibit A to the Petition. App. 30-31.

After MM&A filed suit, the Kaw Nation on January 25, 2003, adopted Resolution 03-05, admitting that the sums sought were owed, acknowledging receipt of summons, and authorizing judgment to be entered as prayed for by MM&A. App. 38-41. This resolution was signed by four of the seven Executive Council members. *Id.* at 41.

The Kaw Nation never filed a response to the summons. The only appearance by the Kaw Nation was a physical appearance by its vice-chairman who, pursuant to Resolution 03-05 appeared in open court and, on behalf of the Kaw Nation, confessed judgment consistent with statutory law.[1] App. 36-37.

Nonetheless, on January 31st, 2003, Michael Salem, an attorney identifying himself as "Attorney for Guy Munroe, Chairman of the Kaw Nation" filed a motion to

[1] 12 O.S. § 689 (2001) "Any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and, with the assent of the creditor or person having such cause of action, confess judgment therefor; whereupon judgment shall be entered accordingly."

dismiss[2] even though: (a) Munroe was not a party to the contract nor a party to the suit, (b) Munroe never moved to intervene,[3] and (c) Munroe's attorney never filed an entry of appearance.[4] Without hearing oral argument and without granting Munroe leave to intervene, the District Court "overruled" MM&A's Motion to Enter Judgment and "sustained" Munroe's Motion to Dismiss "without prejudice for Plaintiff [MM&A] to pursue its remedies in the Kaw Nation tribal court." App. 14-15.

MM&A timely sought reconsideration pointing out, *inter alia*, that the federal government did not recognize a Kaw Nation Tribal Court. These post-dismissal motions were "overruled" without comment. App. 16.

When MM&A appealed the dismissal order, the case was "submitted for accelerated review on the trial court record." App. 9, fn. 16. The case was treated as an appeal of a motion "to dismiss for failure to state a claim or lack of

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[2] This attorney filed subsequent pleadings implying that he also represented other entities. *See, e.g.*, Objection to Entry of Judgment and Motion to Dismiss at 9, filed 2/18/2003 ("Attorney for Guy Munroe Chairman of the Kaw Nation and General Council of the Kaw Nation"). As to this new non-party, no entry of appearance was filed nor a motion to intervene. The new name was just added to the attorney's signature block.

[3] "A person desiring to intervene **shall** serve a motion to intervene upon the parties * * * " 12 O.S. § 2024(C) (bold face added).

[4] 12 O.S. § 2005.2(A). "**Every party** to any civil proceeding in the district courts **shall file** an entry of appearance by counsel * * * no later than the first filing of any pleading." (Bold face added). "All parties to any proceeding in any division of the courts of the Oklahoma/Canadian County Administrative District **shall file** with the Court Clerk, an entry of appearance by counsel * * * no later than the first filing of any pleading or other paper in the case by that counselor party." Seventh Judicial District Rule 49(A).

jurisdiction (of a person or subject matter)." Okla. Sup. Ct. Rule 1.36(a)(2). Under the "accelerated procedure," "no briefs will be allowed on review." *Id.* at Rule 1.36(g).

On appeal, Salem filed his first entry of appearance which reads:

> "The undersigned attorney hereby appears as counsel for:
>
> "GUY MUNROE, Chairman of the Kaw Nation, and the GENERAL COUNCIL OF THE KAW NATION, a legislative body of the Kaw Nation, and based upon the Supplemental Appendix (Tab 7-Decision of the Department of Interior Board of Contract Appeals, Case No. IBCA 4455A/03 decided [sic] 31, 2003) an appearance is also entered for the KAW NATION."

MM&A promptly moved to strike the entry because Salem therein claimed to represent three strangers to the suit (Munroe, General Council, and Executive Council) and made an equivocal claim to represent the Kaw Nation "based on" a Court of Contracts Appeal decision that had no application. The Court of Appeals deferred consideration of this motion.

On December 18, 2003, the Oklahoma Court of Civil Appeals found that "the exhaustion doctrine does not apply in state court actions." App. 10, ¶ 18. Nonetheless, the dismissal was affirmed. App. 13. In affirming without oral argument or briefing, the Oklahoma Court of Civil Appeals converted Munroe's motion to dismiss into one for summary judgment [App. 9, ¶ 16], reviewed it under the standard applicable to appeals of grants of summary judgment, and found the existence and efficacy of tribal court "orders" enjoining the governing majority of the tribe

from voting on certain matters to be "uncontroverted." App. 12, ¶ 20.

The Civil Appeals Court disposed of MM&A's motion for rehearing in five (5) days. The Oklahoma Supreme Court denied certiorari but stayed the effectiveness of its mandate pending resolution of this petition.

ARGUMENT & AUTHORITIES

1. The Oklahoma Court of Appeals' Decision Fails to Follow Existing Supreme Court Opinions.

In reaching its decision, the Oklahoma Court of Civil Appeals ignored decisions of this Court on tribal sovereign immunity and made several critical findings contrary to determinations by the Secretary of the Interior acting through United States Attorneys and through the Bureau of Indian Affairs (BIA) (hereafter jointly referenced as "Secretary"). These findings were also contrary to the record. This Court has held that the federal government has exclusive authority over relations with Indian Tribes. Thus, State Courts must defer to the Secretary's determinations of internal tribal matters.

a. The Court of Appeals' Opinion Conflicts With This Court's Tribal Sovereign Immunity Opinions.[5]

"[T]ribal immunity is a matter of federal law." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). Under federal law, a tribal waiver of "sovereign immunity 'must be unequivocally expressed.'" *U.S. v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (quoting *U.S. v. Testan*, 424 U.S. 392, 399 (1976)).

In *Citizen Band Potawatomi Nation v. C & L Enterprises, Inc.*, 532 U.S. 411 (2001), the Supreme Court held that an Indian tribe waived sovereign immunity when three of its five-member Business Committee signed a contract containing an arbitration clause. In *Citizen Band*, the record contained no evidence of any tribal governmental action to approve the contract or to waive sovereign immunity. *Id.* at 417. Nevertheless, an "unequivocally expressed" waiver of immunity was found because the contract document was signed by three of the five Business Committee members and contained an arbitration clause. *Id.* at 418.

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[5] MM&A first raised sovereign suit immunity waiver in the Petition. App. 27, ¶ 4. The district court did not rule on the alleged waiver but granted a motion to dismiss for failure to exhaust tribal remedies. The Court of Appeals affirmed the dismissal by converting the motion to dismiss into summary judgment and holding that suit was barred by sovereign immunity. MM&A first raised the conflict with Supreme Court opinions in petitioning for rehearing (page 11) and reasserted it in petitioning for certiorari (page 9) to the Oklahoma Supreme Court. Both petitions were denied without comment. App. 17 and App. 18.

Although the present case does not involve construing an arbitration clause as in *Citizen Band*, the facts showing the explicit waiver of sovereign immunity are much clearer than the general language in an arbitration clause. Here MM&A alleged in the Petition [App. 27, ¶ 4] and presented uncontroverted evidence [App. 30-31] that the governing body had waived sovereign immunity and had authorized a confession of judgment. App. 38-41. Here the record below is replete with official tribal governmental action specifically waiving immunity and specifically authorizing a confession of judgment. These actions are all supported by four of the seven-member Executive Council,[6] the governing body of the Kaw Nation authorized by the federally-approved constitution "to act in and on all matters and subjects upon which the tribe is empowered to act." KAW NATION CONST. art. II, § 4(a). Under the circumstances alleged, the Oklahoma Court of Appeals wrongly applied this Court's tribal sovereign immunity jurisprudence. The Kaw Nation clearly "unequivocally expressed" the waiver as required by federal law.

[6] "Matters of business for the Executive Council shall be decided by a majority vote. A quorum of the Executive Council shall be four (4) or more members." KAW NATION CONST. art. II, § 3(h).

b. The Court of Appeals Ignored Secretary of Interior Determinations That Are Controlling Under Federal Law.[7]

Under the Indian Commerce Clause, Congress has plenary authority over Indian tribes. "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (citing U.S. CONST. Art. I, § 8, cl. 3; *see* also *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670, (1974), citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)). This plenary authority has been delegated by Congress to the Secretary of the Interior by and through the Bureau of Indian Affairs ("BIA"). 25 U.S.C. § 2 (2003). Under federal jurisprudence, the Courts of Oklahoma have no jurisdiction to determine internal tribal matters, but must follow the Secretary's determinations concerning same.

> The Court recognizes the legion cases from this Circuit and elsewhere that the Federal Courts are without jurisdiction to entertain and decide internal Indian tribal affairs, matters or disputes; that Congress had exclusive plenary legislative authority over such affairs and has designated and empowered the Secretary of the Interior in this regard. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832); *Martinez v. Southern Ute Tribe of Southern Ute Res.*, 249 F.2d 915 (Tenth [sic] Cir. 1957). The Court must

[7] MM&A first raised this issue in Plaintiff's Response to Guy Munroe's Supplemental Appendix filed March 20, 2003 in the district court and did so continually thereafter. Neither the district court nor the appellate courts ever directly addressed the issue of the Secretary's determinations, but obviously indirectly did so by their orders and opinion.

> further recognize that this prohibition of judicial action must also apply to State Courts as well as Federal Courts. This being so, the Court finds and declares that, as the membership of the Business Council and who is its President are internal tribal affairs, the judicial determinations in these respects and any injunctive order in support thereof by the District Court of Pawnee County, Oklahoma as aforesaid are void for lack of jurisdiction.

United States v. Pawnee Business Council of Pawnee Indian Tribe of Okla., 382 F. Supp. 54, 58-59 (N.D. Okla. 1974).

The Court of Appeals' pronouncements about internal tribal matters were unnecessary because the Kaw Nation made no appearance other than to confess judgment. The Court of Appeals' venture into construing tribal law was wholly gratuitous and contrary to the Secretary's determinations. **First**, the Oklahoma Court of Appeals found that Monroe represented the Kaw Nation (App. 12, ¶ 20) contrary to determinations by the Secretary that Munroe does not.[8] **Second**, the Oklahoma Court of Appeals gave deference to purported "orders" by three men (Charles Tripp, Charles Morris, and Mike McBride) who claim to be

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[8] "Plaintiffs simply do not represent the Kaw Nation, a federally-recognized Indian Tribe, and thus the very caption of this action is deceptive. **The United States** does recognize the Kaw Nation, but **does not recognize the right of Plaintiffs to speak for the Kaw Nation**, much less to hijack the Kaw Nation's governmental authority, to oust its rightful officials, and to plunder its financial resources." *Kaw Nation ex rel. Guy Munroe, General Council, et al. v. Norton*, No. CIV-03-0628-M (Response of Federal Defendants to Plaintiffs' Motion for Temporary Restraining Order at 1) (W.D. Okla. filed 5/28/2003) (bold face added) (hereafter "Federal Response").

Kaw Nation Justices and by Phil Lujan who claims to be a Kaw Nation judge. The Oklahoma Court of Appeals wrote that in "1999, the KNEC [Kaw Nation Executive Council] resolved to appoint three justices to the Supreme Court of the Kaw Nation * * * and the KNGC [Kaw Nation General Council] approved the appointments." App. 2, ¶ 3. No evidence in the record or for that matter anywhere else supports this statement. *See, e.g.*, Federal Response, *supra* note 8 at 2. ("There is no evidence that the Executive Council ever appointed Charles Tripp, Charles Morris, and Mike McBride to the KNSC [Kaw Nation Supreme Court]."). The Oklahoma Court of Appeals relies on a March 4, 2003 "opinion" by these non-justices [App. 8, fn.14] even though the Secretary has noted, "the KNSC [Kaw Nation Supreme Court] itself had no legal existence when this opinion was issued." Federal Response, *supra* note 8 at 10.

The Oklahoma Court of Appeals also states that "the KNEC [Executive Council] resolved to appoint a judge to the District Court of the Kaw Nation, and the KNGC [General Council] approved the appointment." App. 2, ¶ 3. Again no evidence supports the conclusion that a Kaw Nation judicial system has been recognized by the federal government[9] or that Lujan's selection was ever confirmed by the General Council prior to the Executive Council's revocation of Lujan's selection. "The BIA has properly concluded that KNDC [Kaw Nation District Court] Judge Lujan is not properly seated. The [Kaw Nation] Constitution requires that a judge be appointed by the Executive Council and confirmed by the General

[9] *See* 25 C.F.R. § 11.100 (2003). App. 19-23.

Council. The Executive Council withdrew Lujan's appointment before he was confirmed by the General Council. Thus, Lujan acted without proper judicial authority in entering the orders described above [December 9, 2002, "injunctions" *id.* at 3]." Federal Response, *supra* note 8 at 8. The Secretary, as of February 28, 2003, does not recognize orders and decisions issued by the Kaw Nation Court "as valid." App. 34; *see* also App. 24-25. The Oklahoma Court of Appeals states that "Munroe on December 9, 2002, obtained from the tribal district court preliminary injunctions prohibiting the four [governing majority of the Executive Council] from exercising their KNEC authority." App. 4, ¶ 6. This is not only contrary to the Secretary's determinations that Lujan is not a valid judge, it is simply not accurate. The Lujan "injunctions" purport to enjoin four members of the Executive Council "instanter" from "Voting on any matter * * * concerning the expenditure of funds to be paid to Michael Minnis; any matter concerning the appointment or approval of justices of the Supreme Court or the Judge of this Court; any matter concerning the waiver of sovereign immunity to allow Michael Minnis to file suit in State District Court regarding the payment of attorney fees; and any matter concerning the employment status of Guy Munroe, Chairman and C.E.O." *In the Matter of the Removal of Clark Pepper*, Case No. CIV-02-24 (Kaw Nation Dist. Ct., Dec. 9, 2002) (preliminary injunction at 2). These Lujan "injunctions" are facially deficient in nearly every indicia of procedural and substantive due process[10] and facially do not enjoin a vote concerning

[10] The Lujan "injunctions" were preceded on December 5, 2002, by similar temporary restraining orders obtained *ex parte* the day Munroe filed the suits.

MM&A's contract. They purport to enjoin a majority of the governing body from voting, an order patently in excess of any judicial power. As the Secretary has stated: "the [Kaw] Constitution does not empower a judge to enjoin a legislator from voting". Federal Response, *supra* note 8 at 8. At the time these "injunctions" were entered, Lujan admitted he had not been confirmed as a Kaw Nation judge[11] but continued to act as a judge anyway. The Secretary has noted that even if Lujan were a valid judge and his injunctions were valid, a "violation of an injunction [does not] automatically invalidate the action taken, but rather it exposes the violator to contempt for the violation." *Id.* **Third**, the Oklahoma Court of Appeals ignored the Secretary's determinations that the Executive Council is composed of: Chairman Guy Munroe, Vice Chairman Clyde McCauley [who confessed judgment in open court for and on behalf of the Kaw Nation], Secretary Martha Spottedbear, and Members Clark Pepper, Jesse Mehojah, Wanda Stone, and Guyetta Munroe-Martin. App. 34. *See* also, *Kaw Nation v. Lujan*, temporary restraining order, *supra* note 11 at 2 "The Kaw Nation Executive Council ("Executive Council") is the primary governing body of the Kaw Nation. *See* KAW NATION CONST., art. II, § 4. Plaintiffs [Clyde] McCauley, [Martha] Spotted Bear, [Clark] Pepper, and [Jesse] Mehojah constitute a majority of the Executive Council." (finding of fact 2). Four of these members, a majority of the governing body, signed the resolution

[11] "5. Lujan acknowledged that he has not been confirmed by the Kaw Nation General Council pursuant to Article V, Section 3 of the Kaw Nation Constitution." *Kaw Nation v. Lujan*, Case No. CIV-2003-0039 (W.D. Okla., Jan. 13, 2003) (temporary restraining order at 3, finding of fact 5) (hereafter "*Kaw Nation v. Lujan*").

admitting the monies were owed, authorizing suit in Oklahoma County, and the confession of judgment.

Thus, the Oklahoma Court of Appeals' statement that "Munroe adduced uncontroverted evidence of an existing, functioning tribal judicial system composed of properly seated tribal district judge and tribal Supreme Court justices" [App. 12, ¶ 20] is clearly an inaccurate representation of the record but inappropriate in any event because this was *not* an appeal from an evidentiary determination. This case was an appeal from the granting of a motion to dismiss where the reviewing authority must consider the allegations in the Petition as true.

2. By Granting a Motion to Dismiss Filed By a Stranger and On Appeal By Converting a Stranger's Motion to Dismiss Into Summary Judgment, the Oklahoma Courts Have Deprived Petitioner of Federal Constitutional Due Process.

Under the Constitution, a State may not deprive a person of property without due process. U.S. Const. Amend. XIV, 1, § 8. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). As noted earlier, Oklahoma has enacted laws that would have provided the fundamental due process required by the federal Constitution, but the Oklahoma trial and appellate courts here simply ignored these state laws and denied MM&A the fundamental Due Process required by the Fourteenth Amendment.

a. The Oklahoma Court of Appeals Denied MM&A Due Process By Not Allowing a Fair Opportunity to Litigate Sovereign Immunity.[12]

An order granting a motion to dismiss for failure to exhaust tribal remedies cannot be converted on appeal to summary judgment based on sovereign immunity when the Petition alleges waiver of sovereign immunity. Under Oklahoma law – like federal law, a reviewing "court must take as true all of the challenged pleading's allegations together with all reasonable inferences which may be drawn from them." *Fanning v. Brown*, 2004 OK 7, ¶ 4, 85 P.3d 841, 844.

> But the question arises whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for, if not, it is our duty to review and correct the error. * * * Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true.

Postal Telegraph Cable Co. v. City of Newport, Ky., 247 U.S. 464, 473-74 (1918) (reversed for denial of due process under Fourteenth Amendment).

The Oklahoma Court of Appeals correctly rejected exhaustion of tribal remedies as a valid basis for dismissal, but then *sua sponte* converted the dismissal without prejudice filed by a non-party into summary judgment without allowing litigation of the alleged waiver

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[12] MM&A first raised this issue in petitioning the Oklahoma Supreme Court for certiorari. The petition was denied without comment. App. 18.

of immunity. Although such conversion is statutorily authorized at the trial level, it has no application to an appellate court where no discovery has taken place and alternatives[13] have not been vetted by an evidentiary hearing.

> If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and **all parties shall be given reasonable opportunity to present all material made pertinent to the motion by the rules for summary judgment**.

12 O.S. § 2012 (2001).

In converting the motion to dismiss into summary judgment without allowing a fair hearing, the Oklahoma Court of Appeals denied MM&A due process because MM&A was not "given reasonable opportunity to present all material made pertinent to the motion by the rules for summary judgment." The litigant was "deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence." *Saunders v. Shaw*, 244 U.S. 317, 319 (1917). The

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[13] For example, even if the waiver of sovereign immunity by a majority of the governing body is not recognized, other alternatives may be available to a litigant who, *inter alia*, could assert: (1) quantum meruit [*Cf. Prestex Inc. v. U.S.*, 162 Ct.Cl. 620, 320 F.2d 367 (1963)] or (2) approval of the amount owed by a majority of the governing body. *Cf. U.C. Leasing, Inc. v. State ex rel. State Bd. of Public Affairs*, 1987 OK 43, ¶ 19, 737 P.2d 1191.

Supreme Court "cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Id.*

b. The Oklahoma Court of Appeals Denied MM&A Due Process By Not Allowing a Fair Opportunity to Litigate Standing.[14]

The trial court and the Oklahoma Court of Civil Appeals denied MM&A due process by granting and affirming a motion to dismiss filed by a stranger to the suit without a fair opportunity to litigate the stranger's standing. The suit below was brought by MM&A against the Kaw Nation based on a contract between these two entities. Munroe was not a party to the contract or a named party to the suit. His attorney never filed an entry of appearance as mandated by statutory law and local rule. Munroe never filed an application to intervene as any stranger to a lawsuit is statutorily mandated to do by Oklahoma law. In denying MM&A's appellate motion to strike Munroe's appearance, the Oklahoma Court of Appeals stated that "Munroe offered uncontroverted evidence that the KNGC [General Council] expressly authorized his defense of the present action on behalf of the tribe." App. 12, ¶ 20. This "uncontroverted evidence" is not even the basis asserted by Munroe's attorney in his only entry of appearance nor a valid reason for recognizing

[14] MM&A first raised this issue in its Brief in Opposition to Guy Munroe's Motion to Dismiss. (page 2) February 13, 2003. The district court never ruled on the issue though MM&A raised it in every pleading it filed. On appeal, MM&A moved to strike the entry of appearance filed by Munroe's attorney. The Court of Appeals denied this motion in a footnote. App. 12, fn. 18.

Munroe as equivalent to the Kaw Nation. Had Munroe moved to intervene based on the "uncontroverted evidence", his motion would have been litigated and MM&A would have pointed out that – under the Kaw Nation Constitution – the KNGC (an acronym for the Kaw Nation General Council) does not represent the tribe any more than would a group of Oklahoma "voters" represent the State of Oklahoma. Under the Kaw Nation Constitution, the General Council is not given the power to hire attorneys or to sue or be sued in courts. Again the Oklahoma Court of Appeals has unnecessarily attempted to massively alter the constitutional government established under federal law by wrongly treating the Kaw Nation as a pure democracy when it is clearly a representative government.[15] The General Council elects the Executive Council which – as noted earlier – has virtual plenary authority under the Kaw Nation Constitution to act for the Kaw Nation. That Munroe's attorney did not file any pleading in the District Court as an attorney for the Kaw Nation is his explicit recognition that he did not represent the tribe.

These failures to follow statutory appearance requirements were obvious attempts to mislead the court into falsely believing that the attorney for Munroe was the attorney for the Kaw Nation. A Munroe practice that the United States Attorney has called "deceptive." *See supra* note 8.

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[15] In critiquing the March 4, 2003, KNSC "opinion", Interior noted that "the KNSC essentially has rewritten the Kaw Nation Constitution to erect a General Council form of government. To do so, the KNSC had to completely ignore the provisions of the Constitution * * * " Federal Response, *supra* note 8 at 10.

> "'When a statute speaks of a party it refers to a party to the record, a plaintiff or a defendant, and generally those who are not named as such in the record are not properly regarded as parties and may not avail themselves of rights given to parties. One who is not a party to the record is not a party to the cause, although he may be interested, and in deciding who are parties to the record, the courts will not look beyond the record.'"

Anderson v. Miller, 1958 OK 67, ¶ 6, 324 P.2d 856, 859 (quoting 39 Am.Jur. *Parties*, § 4 (1942)).

The filing of a motion to dismiss did not make Munroe a party to the suit. *Exchange Trust Co. v. Palmer*, 1933 OK 210, ¶ 11, 20 P.2d 897, 899 ("We do not think that the filing of the motions by the claimants constituted them parties to the extent that the action would be res adjudicata to them"). In allowing Munroe's attorney to litigate as if Munroe was a party without a fair hearing on his standing to do so, the Trial Court and the Oklahoma Court of Civil Appeals deprived MM&A of property without due process.

CONCLUSION

MM&A had a written contract with the Kaw Nation authorized by the governing body of the tribe. The governing body adopted a resolution admitting the sums sought were owed, waiving sovereign immunity, authorizing suit in Oklahoma County and authorizing a confession of judgment. Acting on that authorization, the Vice Chairman of the tribe appeared in open court and confessed judgment. Under the trial court decision affirmed by the

Oklahoma Court of Appeals, one dissenting member of the governing body utilizing an illegal tribal court can preclude enforcement of the contract simply by filing a motion to dismiss. The dissenting member does not have to follow any state substantive and procedural laws requiring filed entries of appearance and requiring non-parties to obtain leave to intervene. Most importantly, the Oklahoma courts have recognized a dissenting tribal official as having plenary authority over the tribe without ever providing the litigant who sued the tribe with fundamental due process required by the U.S. Constitution. By ignoring determinations made by the Secretary, the Court of Appeals has created commercial chaos in Oklahoma Indian country. Non-tribal persons, like MM&A, who have commerce with federally-recognized Indian tribes, must be able to rely on federally-approved tribal constitutions and the Secretary's determinations concerning internal tribal matters related thereto. The Oklahoma Court of Appeals' decision has made contracting with an Indian tribe even more tenuous than it already is.

The Supreme Court should grant this petition, reverse the Oklahoma Court of Civil Appeals' Opinion, and remand with instructions to enter judgment for the Plaintiff as prayed for in the Petition.

Respectfully submitted,

MICHAEL MINNIS
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
(*Counsel of Record*)
Attorneys for Petitioner
MICHAEL MINNIS & ASSOCIATES, P.C.

June 2004

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MINNIS & ASSOCIATES, P.C. v. KAW NATION
2004 OK CIV APP 36
Case Number: 99565
Decided: 12/18/2003
Mandate Issued: 04/15/2004
DIVISION NO. III
THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION NO. III

Cite as: 2004 OK CIV APP 36, ___ P.3d ___

MICHAEL MINNIS & ASSOCIATES, P.C.,
Plaintiff/Appellant,
v.
KAW NATION, Defendant/Appellee.

APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CAROLYN R. RICKS, JUDGE

AFFIRMED

Michael Minnis, Michael Minnis & Associates, P.C., Oklahoma City, Oklahoma, for Appellant.

Michael Salem, Norman, Oklahoma, for Appellee.

Opinion by LARRY JOPLIN, Chief Judge.

¶ 1 Plaintiff/Appellant Michael Minnis & Associates, P.C., a corporation (MM&A), seeks review of the trial court's order granting the motion to dismiss of Defendant/Appellee Kaw Nation, denying MM&A's motion to enter judgment, and denying MM&A's motions for "Re-Examination" and to vacate appealable orders, on MM&A's claims to recover attorney's fees for services rendered to the Kaw Nation. Having reviewed the record, however, we

discern no error by the trial court, and hold the orders of the trial court should be affirmed.

¶ 2 The Kaw Nation is a recognized sovereign Native American tribe. The Kaw Nation Executive Council (KNEC) is the primary governing body of the tribe, and is "composed of the following [tribal] officers: Chairman, Vice-Chairman, Secretary and four Council Members."[1,2] The Kaw Nation General Council (KNGC) consists of all members of the Kaw Nation,[3] and the KNGC must, in certain instances, approve the actions of the KNEC.[4]

¶ 3 In 1999, the KNEC resolved to appoint three justices to the Supreme Court of the Kaw Nation, Charles Tripp (Tripp), Charles Morris (Morris) and Michael McBride (McBride), and the KNGC approved the appointments. At some point (the precise date is not born out by the record) the KNEC resolved to appoint a judge to the District Court of the Kaw Nation, and the KNGC approved the appointment. These

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[1] Constitution of the Kaw Nation, Art. II, Legislative Functions, § 3(a).

[2] *See also*, Constitution of the Kaw Nation, Art. III, Executive Functions, §§ 1, 2 ("The Executive functions of the Kaw Nation shall be vested in the Chairman, the Vice-Chairman, the Secretary, and the Treasurer"; "It shall be the duty of the Chairman to preside at all meetings of the [KNGC] and [KNEC] [and][t]he Chairman shall have general supervision of the affairs of the [KNGC] and [KNEC]. . . .")

[3] Constitution of the Kaw Nation, Art. II, Legislative Functions, § 2.

[4] Constitution of the Kaw Nation, Art. II, Legislative Functions, § 4(b)(1-5) (KNGC approval required for: sale, mortgage or alienation of tribally owned lands; enactment, amendment, or repeal of ordinances respecting tribal elections, recall or removal of officers; exercise of eminent domain; appointment of judicial officers; pay increases of tribal officers if paid from tribal funds.)

appointments filled all judicial positions permitted by tribal law.

¶ 4 On or about January 12, 2002, Vice-Chairman Clyde McCauley (McCauley), Secretary Martha Spotted Bear (Spotted Bear), and two KNEC members, Jesse Mehojah (Mehojah) and Clark Pepper (Pepper), constituting a majority of the KNEC, resolved to contract with MM&A for legal services.[5] On or about January 15, 2002, Minnis, as president of MM&A, and Vice-Chairman McCauley, on behalf of the Kaw Nation, executed a "General Counsel Contract" containing, inter alia, a stipulation to the jurisdiction of the Kaw Nation tribal courts.[6]

¶ 5 In April 2002, the sitting judge of the tribal district court resigned for health reasons, and the KNEC appointed

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[5] Resolution No. 02-07, signed by the Vice-Chairman of Kaw Nation Executive Council, contained a "certification" that "said resolution was approved and adopted on [January 12,] 2002, as an official act by quorum vote of the Kaw Nation Executive Council, . . . that the vote was 4 for; [0] against; 1 abstentions; and 1 absent," and was signed by the Executive Council Vice-Chairman.

[6] On page five of the contract, the parties struck the original typewritten ¶ 15 of the agreement, providing:

> Immunity. For the limited purpose of allowing [MM&A] to enforce this contract, the Kaw Nation hereby waives immunity to suit and agrees that suit may be filed in the state District Court for Oklahoma County. For the purpose of enforcing any money judgment obtained by [MM&A] hereunder, the Kaw Nation also waives governmental immunity as to its non-federal, non-trust assets.

The parties substituted a hand written ¶ 15, which provided:

> It is understood and mutually agreed that as a material and substantial consideration of this agreement that the parties mutually stipulate to the jurisdiction of the courts of the Tribe.

Philip Lujan (Lujan) as a special tribal district court judge to serve until a permanent replacement was found. In June 2002, the KNEC resolved to appoint Lujan as successor tribal district court judge, and although not immediately confirmed by the KNGC, Lujan assumed the duties of the office and exercised authority as a temporary tribal district court judge pursuant to tribal law.

¶ 6 In September 2002, Guy Munroe was elected tribal Chairman and allegedly "blocked" further payments of attorney's fees to MM&A. On or about December 5, 2002, Munroe commenced actions in the tribal district court for removal of McCauley, Spotted Bear, Mehojah and Pepper[7] (hereinafter, Removal Respondents) from the KNEC, and on December 9, 2002, obtained from the tribal district court preliminary injunctions prohibiting the four from exercising their KNEC authority.

¶ 7 In spite of the tribal district court injunctions, the Removal Respondents met three days later on December 12, 2002, and, as an avowed majority of the KNEC, passed several resolutions. One purported to waive tribal sovereign immunity and consent to suit in state court by MM&A to collect the unpaid fees allegedly due under the legal services contract.[8] One purported to vacate Lujan's

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[7] The four KNEC members who initially voted to approve the MM&A legal services contract.

[8] Resolution No. 02-98 dated December 12, 2002, "waive[d] sovereign immunity and submitt[ed] to the jurisdiction of the courts of the State of Oklahoma solely to allow [MM&A] to sue the Kaw Nation for the recovery of attorney fees and expenses incurred under said contract and to pursue post-judgment remedies against the assets of the Kaw Nation." That resolution contained a "certification" "that the above and foregoing resolution is a true, accurate and correct copy of

(Continued on following page)

appointment as tribal district court judge,[9] and another purported to dismantle the tribal judicial system and submit to the courts of the Bureau of Indian Affairs.[10]

¶ 8 On December 15, 2002, the KNGC met. At that meeting, the KNGC passed resolutions approving the appointment of Lujan as tribal district court judge, and "reaffirming" an earlier KNGC decision of June 2002 to discharge MM&A as tribal general counsel. On or about December 20, 2002, Munroe – in his avowed capacity as tribal Chairman and allegedly on behalf of the Kaw Nation – commenced an action in tribal district court against Minnis, seeking recovery of over $90,000.00 previously paid pursuant to the parties' legal services contract.

¶ 9 On January 7, 2003, MM&A filed its original petition to commence the instant action in the state trial court for breach of contract, seeking recovery of unpaid legal fees for services rendered to the Kaw Nation pursuant to the "General Counsel Contract" executed by Vice-Chairman McCauley. To the petition, MM&A attached a copy of the contract, and copies of the two KNEC resolutions approving

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the resolution duly adopted and approved on the 12th day of December, 2002, as an official act by quorum vote of the Kaw Nation Executive Council, and that the vote was 4 for; 0 against; 0 abstentions; and 3 absent," and was signed by the Executive Council Vice-Chairman, Secretary, and two other members of the Executive Council.

[9] KNEC Resolution No. 02-95.

[10] KNEC Resolution No. 02-96A provided: "The Kaw Nation hereby explicitly turn the control of its courts back to the Bureau of Indian Affairs and submits to the jurisdiction of the courts of the Bureau of Indian Affairs. . . ."

the General Counsel contract and consenting to state court jurisdiction.[11]

¶ 10 Also in January 2003, the Removal Respondents – both individually and purportedly on behalf of the Kaw Nation, and represented by Minnis – filed suit in the United States District Court for the Western District of Oklahoma against Lujan, tribal justices Tripp and Morris, and Munroe as tribal Chairman. In the suit, the Removal Respondents alleged tribal and federal constitutional and statutory violations by the tribal courts, and sought to enjoin the tribal judges' exercise of judicial authority, as well as Munroe's payment of their compensation from tribal funds.

¶ 11 On or about January 24, 2003, Lujan and Munroe filed motions to dismiss in the federal court action. In February 2003, considering the "tortuous and constantly changing" background of the case, the federal district court dismissed the Removal Respondents' action for failure to exhaust tribal remedies.[12]

¶ 12 On or about January 31, 2003, MM&A filed a motion for judgment in the present action. In support,

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[11] *See*, footnotes 5, 8, *supra*.

[12] Particularly, the federal district court reasoned: (1) the "futility" exception to the exhaustion-of-tribal-remedies doctrine is not properly invoked by the bare challenge to the jurisdiction of the tribal courts; (2) the "existence of a tribal forum is, at a minimum, 'facially apparent'" from the record; and (3) "the issue of the [tribal] judicial officers' authority to act is purely intra-tribal in nature . . . requir[ing] an in-depth consideration and comparison of tribal constitutional provision," a "herculean task," "properly resolved, at least in the first instance, in a tribal forum."

MM&A offered KNEC resolutions passed by the Removal Respondents purporting to waive the tribe's sovereign immunity, submitting to the jurisdiction of the trial court, and confessing judgment.

¶ 13 Also on January 31, Munroe filed a motion to dismiss, asserting: improper venue; another suit pending (in tribal court); the contractual stipulation to tribal court jurisdiction; tribal sovereign immunity; invalidity of any waiver of tribal immunity by the Removal Respondents; and failure to exhaust tribal remedies. In support of the motion to dismiss, and in opposition to the motion for judgment, Munroe submitted his affidavits and evidentiary materials demonstrating the facts we have recounted. Munroe also submitted evidence of subsequent resolutions of the KNGC in February 2003 (1) reaffirming the previous appointments of the tribal justices; (2) expressly holding all resolutions passed by the Removal Respondents to be void ab initio[13]; and (3) demanding the resignation of the Removal Respondents. Munroe additionally offered evidence of two orders of the tribal district court removing McCauley and Pepper; a decision of the

[13] KNGC Resolution No. 03-15:(1) explicitly "affirms [the KNGC's] superintending authority under the Kaw Nation Constitution in the governance of tribal affairs"; (2) "rejects any action or effort of the [KNEC] or any subgroup to return the judicial system to the" BIA; (3) holds "all of the [previous] resolutions proposed by [Removal Respondents] . . . to be null and void from their beginning"; (4) authorizes expenditure of tribal funds to recover any loss to the tribe caused by the Removal Respondents and to defend any of the pending related suits; and (5) "[t]hat the [KNEC], or any subgroup, . . . shall not waive sovereign immunity or consent to any suit brought in derogation of the Kaw Nation's sovereign immunity and that such power and authority shall be reserved only to the [KNGC]."

tribal Supreme Court holding Lujan properly seated as tribal district court judge[14]; and a decision of the Department of Interior, Office of Hearings and Appeals granting a "stay of the retrocession" "until the Nation has had an opportunity to resolve" the "political disagreement between two factions of the [KNEC]" which "involves very fundamental issues under . . . the Nation's own Constitution."

¶ 14 MM&A responded, asserting that Munroe lacked standing to represent tribal interests, and resort to tribal remedies would be futile, arguing that no tribal court system existed. On the standing issue, MM&A offered provisions of the tribal constitution purported to vest in the KNEC sole authority to represent tribal interests. To demonstrate "futility," MM&A presented evidentiary materials argued to show that KNEC – by and through the Removal Respondents – had resolved to dismantle the Kaw Nation tribal court system, to "turn control of [the Kaw Nation] courts back to the Bureau of Indian Affairs and submit to the jurisdiction of the courts of the" BIA,[15] and BIA's acknowledgment of "the retrocession . . . pursuant to a vote of the [KNEC]."

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[14] The Kaw Nation Supreme Court noted in its decision that "the resolutions passed by Removal Respondents on December 12, 2002 are void because they are inconsistent with the [Kaw Nation] Constitution."

[15] "A 'C.F.R. court' is a court created pursuant to Bureau of Indian Affairs regulations to preside over tribal matters in the absence of a court established by tribal government. 25 C.F.R. §§ 11.100; *see Tillett v. Lujan*, 931 F.2d 636, 638, 640 (10th Cir. 1991)." *Pounds v. Department of Interior*, 9 Fed.Appx. 820, 821, fn. 1. (10th Cir. (Okla.) 2001).

¶ 15 The trial court granted Munroe's motion to dismiss and denied MM&A's motion for judgment "without prejudice for [MM&A] to pursue its remedies in the Kaw Nation tribal court." MM&A filed motions to vacate and reconsider, which the trial court denied. MM&A appeals, and the matter stands submitted for accelerated review on the trial court record.[16]

¶ 16 "Where a motion to dismiss tenders facts to be considered by offering materials dehors [sic] the pleadings, it is incumbent upon the trial court to treat the motion as one for summary judgment." *Patel v. OMH Medical Center, Inc.*, 1999 OK 33, ¶ 17, 987 P.2d 1185, 1192. *See also*, 12 O.S. § 2012(B). We review an order granting a motion for summary judgment "by a de novo standard." *Prudential Ins. Co. of America v. Glass,* 1998 OK 52, ¶ 2-3, 959 P.2d 586, 588; *Sperling v. Marler,* 1998 OK 81, ¶ 3, 963 P.2d 577, 579. The trial court's ruling on a motion to vacate will not be disturbed unless affected by an abuse of discretion. *See, e.g., Nelson v. Nelson,* 1998 OK 10, ¶ 23, 954 P.2d 1219, 1228. The trial court's ruling on a motion for new trial or reconsideration will likewise remain undisturbed unless affected by an abuse of discretion. *See, e.g., Strubhart v. Perry Memorial Hosp. Trust Authority,* 1995 OK 10, ¶¶ 16-17, 903 P.2d 263, 269-270.

¶ 17 "[T]he [U.S.] Supreme Court has uniformly recognized that one of the fundamental aspects of tribal existence is the right to self-government." *Wheeler v. U.S. Dep't of the Interior,* 811 F.2d 549, 551 (10th Cir. (Okla.)

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[16] *See*, Rules 4(m), 13(h), Rules for District Courts, 12 O.S. 2001, Ch. 2, App.; Ok.S.Ct.R. 1.36, 12 O.S. 2001, Ch. 15, App.

1987). (Citations omitted.) In deference to the tribal rights of self-government, and "as a matter of *comity,* a *federal* court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies." *Tillett v. Lujan,* 931 F.2d 636, 640 (10th Cir. (Okla.) 1991). (Emphasis added.)[17]

¶ 18 However, the exhaustion doctrine does not apply in state court actions. An action against a sovereign Native American tribe in state court is barred absent Congressional authorization or an express waiver of tribal sovereign immunity:

> In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), the manufacturing company brought suit in state court to recover on a promissory note executed by the Kiowa Tribe. The Tribe moved to dismiss based on the doctrine of sovereign immunity. The District Court denied the motion to dismiss, and granted judgment in

[17] In this respect, the exhaustion-of-tribal-remedies doctrine dictates that the question of tribal court jurisdiction "should be conducted in the first instance in the Tribal Court itself." *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 856, 105 S.Ct. 2447, 2454, 85 L.Ed.2d 818 (U.S. (Mont.) 1985). The exhaustion doctrine does not bar a suit in federal court in some instances, if, for instance, "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." *National Farmers Union Ins. Co.,* 471 U.S. at 856, 105 S.Ct. at 2454, fn. 21. But, the federal courts generally apply the "futility" exception only in the total absence of a tribal court system. *See, e.g., Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas,* 261 F.3d 567, 572-573 (5th Cir. (Tx.) 2001).

> favor of the manufacturing company. The Oklahoma Court of Civil Appeals affirmed. . . .
>
> The United States Supreme Court reversed the Court of Civil Appeals, holding that *"tribal immunity is a matter of federal law and is not subject to dimunition [sic] by the States." "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."* The Court continued by pointing out that in its cases, immunity from suit has been sustained without distinction as to where the activities occurred. Nor is there to be a distinction based on whether the activities are commercial or governmental. The Court reiterated that in some instances the state might have the right to demand compliance with state laws, but may have no means available to enforce those laws.
>
> . . . .
>
> It is true that this rule of law may discourage certain entities from wanting to do business with tribes, and such public policy considerations played a role in our earlier decisions. However, the Supreme Court has noted, as do we, that an express waiver of sovereign immunity may be inserted into the contract, and when so done the business or entity will be protected, and will have preserved its right to pursue the matter in state court.

Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Oklahoma, 1998 OK 128, ¶¶ 8-10, 975 P.2d 442, 444-445. (Footnotes omitted.) (Citations omitted.) (Emphasis added.) So, absent an express waiver of tribal sovereign immunity or Congressional authorization, the Kaw Nation cannot be sued in the Oklahoma state courts.

¶ 19 In the present case, MM&A offered what appeared to be the facially valid KNEC Resolutions passed by the Removal Respondents purporting to waive tribal sovereign immunity, consent to the jurisdiction of the trial court and confess judgment in favor of MM&A. MM&A also presented evidence argued to show the total absence of a tribal judicial forum for resolution of his claim, and challenged Munroe's capacity to represent tribal interests in this litigation under the tribal Constitution.

¶ 20 In opposition, however, Munroe adduced uncontroverted evidence of an existing, functioning tribal judicial system compromised of a properly seated tribal district judge and tribal Supreme Court justices, and the Department of Interior's "stay" of the Removal Respondents' attempted retrocession of the tribal courts. Munroe also offered uncontroverted evidence of the Kaw Nation Supreme Court decision, holding that the Removal Respondents' attempts to waive sovereign immunity, consent to jurisdiction, confess judgment and dismantle the tribal judicial system were wholly void as in violation of the tribal constitution and the preliminary injunctions issued by the tribal district court in the removal proceedings. Lastly, Munroe offered uncontroverted evidence that the KNGC expressly authorized his defense of the present action on behalf of the tribe.[18]

¶ 21 The parties' contract contained an express stipulation to the jurisdiction of the tribal courts, and the uncontroverted evidence established invalidity of the attempted

[18] MM&A's "Motion to Strike Phrase from Entry of Appearance," by which it questioned the capacity of Munroe's legal counsel to represent the Kaw Nation, is accordingly denied.

waiver of tribal sovereign immunity, consent to jurisdiction and confession of judgment affected by the Removal Respondents. Absent a valid, express waiver of tribal sovereign immunity by contract, the tribal government or Congressional authorization, MM&A's state court action is barred. *Gungoll Exploration Joint Venture,* 1998 OK 128, ¶¶ 8-10, 975 P.2d at 444-445.

¶ 22 The order of the trial court denying MM&A's motion to reconsider and motion to vacate is therefore AFFIRMED.

ADAMS, P.J., and JONES, J., sitting by designation, concur.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

MICHAEL MINNIS & ASSOCIATES, P.C., a Corporation,	)	
Plaintiff,	)	
vs.	)	CJ-2003-118
KAW NATION, a Federally recognized Indian tribe,	)	
Defendants.	)	

ORDER
(Filed Apr. 8, 2003)

Before this Court is a Motion to Enter Judgment filed by Plaintiff, Michael Minnis & Associates, Inc. and a Motion to Dismiss filed by Defendant, Kaw Nation. The Court has considered the briefs and attachments, arguments of counsel contained therein and relevant law. Based on the foregoing, the Court makes the following rulings.

Plaintiff's Motion to Enter Judgment is overruled. Defendant's Motion to Dismiss is sustained, but without prejudice for Plaintiff to pursue its remedies in the Kaw Nation tribal court.

IT IS THEREFORE ORDERED that the Plaintiff, Michael Minnis & Associates, Motion to Enter Judgment is hereby OVERRULED.

IT IS FURTHER ORDERED that the Defendant, Kaw Nation's, Motion to Dismiss is hereby SUSTAINED

without prejudice for Plaintiff to pursue its remedies in the Kaw Nation tribal court.

Dated this 8th day of April, 2003.

/s/ Carolyn R. Ricks
CAROLYN R. RICKS,
District Judge

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

MICHAEL MINNIS & ASSOCIATES, P.C., a Corporation, Plaintiff, vs. KAW NATION, a Federally recognized Indian tribe, Defendants.	)	CJ-2003-118

ORDER
(Filed Jul. 7, 2003)

Before this Court is a Motion for Re-examination of Decision and to Vacate Appealable Orders filed by Plaintiff, Michael Minnis & Associates, Inc. The Court has considered the briefs and attachments, arguments of counsel contained therein and relevant law. Based on the foregoing, the Court finds that the Plaintiff's Motion is overruled.

IT IS THEREFORE ORDERED that the Plaintiff, Michael Minnis & Associates, Motion for Re-examination of Decision and to Vacate Appealable Orders t [sic] is hereby OVERRULED.

Dated this 30th day of June, 2003.

/s/ Carolyn R. Ricks
CAROLYN R. RICKS,
District Judge

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF CIVIL APPEALS DIVISION III

January 12, 2004

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

99,565 – Michael Minnis & Associates, P.C., Plaintiff/ Appellant, v. Kaw Nation, Defendant/Appellee.

Appellant's Petition for Rehearing is DENIED.

Appellee's Motion to Award Counsel Fees is DENIED.

DONE BY ORDER OF THE COURT OF CIVIL APPEALS IN CONFERENCE this 12th day of January, 2004.

/s/ Jesse Mehojah
GLENN D. ADAMS,
Presiding Judge

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(Filed Monday, March 29, 2004)

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

99,417 Business Men's Assurance Company of America v. Edna E. Mitchell and James E. Mitchell in his capacity as Trustee of the Leonard E. Mitchell Trust dated August 1, 1994.

Petition for certiorari is denied.
CONCUR: Watt, C.J., Lavender, Hargrave, Kauger, Winchester, Edmondson, JJ.

DISSENT: Opala, V.C.J., Hodges, Boudreau, JJ.

99,565 Michael Minnis & Associates, P.C. v. Kaw Nation
Both petitions for certiorari are denied.
ALL JUSTICES CONCUR.

100,355 Dr. Louis H.A. Cox v. Kathryn Cox, husband and wife v. the Honorable Nancy L. Coats
Application to assume original jurisdiction is granted. All relief is denied.
CONCUR: Watt, C.J., Hodges, Lavender, Kauger, Boudreau, Winchester, Edmondson, JJ.
DISSENT: Opala, V.C.J.
DISQUALIFIED: Hargrave, J.

100,356 Julie Thompson & Ella Kay Beal v. The Honorable Farrell M. Hatch, Judge of the District Court of Bryan County.
Application to assume original jurisdiction is denied.
ALL JUSTICES CONCUR.

/s/ Joseph M. Watt
CHIEF JUSTICE

25 C.F.R. § 11.100 Listing of Courts of Indian Offenses.

(a) Except as otherwise provided in this title, the regulations under this part are applicable to the Indian country (as defined in 18 U.S.C. 1151) occupied by the following tribes:

(1) Red Lake Band of Chippewa Indians (Minnesota).

(2) Confederated Tribes of the Goshute Reservation (Nevada).

(3) Lovelock Paiute Tribe (Nevada).

(4) Te-Moak Band of Western Shoshone Indians (Nevada).

(5) Yomba Shoshone Tribe (Nevada).

(6) Kootenai Tribe (Idaho).

(7) Shoalwater Bay Tribe (Washington).

(8) Eastern Band of Cherokee Indians (North Carolina).

(9) For the following tribes located in the former Oklahoma Territory (Oklahoma):

(i) Absentee Shawnee Tribe of Indians of Oklahoma

(ii) Apache Tribe of Oklahoma

(iii) Caddo Tribe of Oklahoma

(iv) Cheyenne-Arapaho Tribe of Oklahoma

(v) Citizen Band of Potawatomi Indians of Oklahoma

(vi) Comanche Tribe of Oklahoma (except Comanche Children's Court)

(vii) Delaware Tribe of Western Oklahoma

(viii) Fort Sill Apache Tribe of Oklahoma

(ix) Iowa Tribe of Oklahoma

(x) Kaw Tribe of Oklahoma

(xi) Kickapoo Tribe of Oklahoma

(xii) Kiowa Tribe of Oklahoma

(xiii) Otoe-Missouria Tribe of Oklahoma

(xiv) Pawnee Tribe of Oklahoma

(xv) Ponca Tribe of Oklahoma

(xvi) Tonkawa Tribe of Oklahoma

(xvii) Wichita and Affiliated Tribes of Oklahoma.

(10) Hoopa Valley Tribe, Yurok Tribe, and Coast Indian Community of California

(California Jurisdiction limited to special fishing regulations).

(11) Louisiana Area (includes Coushatta and other tribes in the State of Louisiana which occupy Indian country and which accept the application of this part); Provided that this part shall not apply to any Louisiana tribe other than the Coushatta Tribe until notice of such application has been published in the FEDERAL REGISTER.

(12) For the following tribes located in the former Indian Territory (Oklahoma):

(i) Chickasaw Nation

(ii) Choctaw Nation

(iii) Thlopthlocco Tribal Town

(iv) Seminole Nation

(v) Eastern Shawnee Tribe

(vi) Miami Tribe

(vii) Modoc Tribe

(viii) Ottawa Tribe

(ix) Peoria Tribe

(x) Quapaw Tribe

(xi) Wyandotte Tribe

(xii) Seneca-Cayuga Tribe

(xiii) Osage Tribe.

(13) Ute Mountain Ute Tribe (Colorado).

(14) Sante Fe Indian School Property, including the Santa Fe Indian Health Hospital (land in trust for the 19 Pueblos of New Mexico).

(15) Paiute-Shoshone Indian Tribe of the Fallon Reservation and Colony (land in trust for the Paiute-Shoshone Indian Tribe of the Fallon Reservation and Colony).

(b) It is the purpose of the regulations in this part to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established to exercise that jurisdiction.

(c) The regulations in this part shall continue to apply to tribes listed under § 11.100(a) until a law and order code which includes the establishment of a court system has been adopted by the tribe in accordance with its constitution and by-laws or other governing documents, has become effective, and the Assistant Secretary – Indian Affairs or his or her designee has received a valid tribal enactment identifying the effective date of the code's implementation, and the name of the tribe has been deleted from the listing of Courts of Indian Offenses under § 11.100(a).

(d) For the purposes of the enforcement of the regulations in this part, an Indian is defined as a person who is a member of an Indian tribe which is recognized by the Federal Government as eligible for services from the BIA, and any other individual who is an "Indian" for purposes of 18 U.S.C. 1152–1153.

(e) The governing body of each tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction may enact ordinances which, when approved by the Assistant Secretary – Indian Affairs or his or her designee, shall be enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe, and shall supersede any conflicting regulation in this part.

(f) Each Court of Indian Offenses shall apply the customs of the tribe occupying the Indian country over which it has jurisdiction to the extent that they are consistent with the regulations of this part.

[58 FR 54411, Oct. 21, 1993, as amended at 59 FR 48722, Sept. 22, 1994; 61 FR 10674, Mar. 15, 1996; 66 FR 22121, May 3, 2001; 66 FR 48087, Sept. 18, 2001; 67 FR 44355, July 2, 2002; 67 FR 59783, Sept. 24, 2002]

22728 Fed. Reg. Vol. 68, No. 82, Tuesday, April 29, 2003

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Law and Order on Indian Reservations

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Intent to reassume judicial jurisdiction.

SUMMARY: This notice announces the Bureau of Indian Affairs' intent to reassume judicial jurisdiction for the Kaw Nation of Oklahoma and to administer court cases under the Court of Indian Offenses for the Southern Plains Region.

EFFECTIVE DATE: April 29, 2003.

FOR FURTHER INFORMATION CONTACT: Terry Bruner, Tribal Government Officer, Southern Plains Regional Office, Bureau of Indian Affairs, PO Box 368, WCD Office Complex, Anadarko, Oklahoma 73005, Telephone (405) 247-6673 ext 209, Fax (405) 247-9240; or Ralph Gonzales, Branch of Judicial Services, Office of Tribal Services, Bureau of Indian Affairs, 1951 Constitution Avenue, NW., MS 320-SIB, Washington, DC 20240, Telephone (202) 208-4401.

SUPPLEMENTARY INFORMATION: This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary – Indian Affairs under part 209, Chapter 8, of the Departmental Manual (209 DM 8).

On November 16, 2002, the Kaw Executive Council passed a motion to return court function to the Bureau of Indian Affairs. On December 12, 2002, Resolution 96(a) was adopted by a majority of the Executive Council for the

same purpose. By letter dated February 28, 2003, the Office of Self-Governance, Department of the Interior, advised the Kaw Nation that the funding for the tribal court was being withdrawn and that the Bureau of Indian Affairs, Southern Plains Regional Office's (formerly the Anadarko Area Office) Court of Indian Offenses would reassume jurisdiction over matters arising within the Kaw Nation, as listed in 25 CFR part 11.100(a)(9)(x). The Court of Indian Offenses for the tribes in western Oklahoma was established in response to the decisions of *United States v. Littlechief,* No. CR-76-207-D, and *State of Oklahoma v. Littlechief,* 573 P.2d 263 (Okla. Crim. App. 1978), which held that the State of Oklahoma lacked jurisdiction over matters occurring on trust or restricted lands (44 FR 37502). This Court of Indian Offenses continues to serve those tribes in the Southern Plains Region which have not established tribal courts. The Kaw Nation's retrocession and closing of its tribal court creates a jurisdictional vacuum. In order to protect lives, persons, and property of people residing within the Nation's jurisdiction, the Bureau of Indian Affairs must immediately reassume judicial jurisdiction within the Indian country of the Kaw Nation of Oklahoma, until such time as the Nation reestablishes its court in accordance with 25 CFR 11.100(c). For this reason, effective April 29, 2003, the Bureau of Indian Affairs reassumes judicial jurisdiction for the Kaw Nation of Oklahoma.

Dated: April 15, 2003.

Aurene M. Martin,

Assistant Secretary – Indian Affairs.

IN THE DISTRICT COURT
IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

MICHAEL MINNIS & ASSOCIATES, P.C., a corporation, Plaintiff,	)	Case No. CJ-2003-118
v.	)	
KAW NATION, a Federally-recognized Indian tribe, Defendant.	)	

PETITION

(For services and expenses earned under written contract)

(Filed Jan. 7, 2003)

COMES NOW Michael Minnis & Associates, P.C., a corporation, and for its claim for relief alleges as follows.

PARTIES

1. The Plaintiff is Michael Minnis & Associates, P.C. (hereafter "MM&A"), a professional corporation organized under the Professional Corporation Act of the State of Oklahoma, whose principal place of business is at 100 N Broadway Ave Ste 3160 in Oklahoma City, Oklahoma County, Oklahoma.

2. The Defendant is the Kaw Nation, a federally recognized Indian tribe, whose tribal headquarters are located at P.O. Box 50, Kaw, OK 74641 in Kay County, Oklahoma.

JURISDICTION AND VENUE

3. Under its federally-approved Constitution, the Executive Council is the "legislative body of the Kaw Nation and shall have the authority to act in and on all matters and subjects upon which the Tribe is empowered to act, now or in the future." KAW NATION CONST. art. II, § 4(a).

4. In a resolution duly adopted by a majority of the Executive Council, the Kaw Nation explicitly waived "sovereign immunity and submits to the jurisdiction of the courts of the State of Oklahoma solely to allow Michael Minnis & Associates, P.C. to sue the Kaw Nation for the recovery of attorney fees and expenses" incurred under contract. A copy of this Resolution (No. 02-98) is attached hereto as "Exhibit A."

5. Because this is a civil action *ex contractu* and the contract was accepted and services performed in Oklahoma County, venue is proper in Oklahoma County. 12 O.S. § 142.

CLAIM FOR RELIEF – BREACH OF CONTRACT

6. In addition to the broad general powers previously alleged, the Kaw Nation Executive Council is specifically authorized "To employ legal counsel, the choice of counsel and fixing of fees." KAW NATION CONST. art. II, § 4(a)(3).

7. Exercising its broad general powers and its specific powers, the Kaw Nation adopted Resolution Number 02-07 on the 12th day of January, 2002, resolving that "the Executive Council of the Kaw Nation agrees to the contract agreement." A true and correct copy of this resolution is attached hereto as Exhibit B.

8. Empowered by this resolution Clyde McCauley, Vice Chairman of the Kaw Nation, signed on behalf of the Kaw Nation a proposed written contract with MM&A that was accepted in Oklahoma County on or about January 15, 2002. A copy of the contract is attached as Exhibit C.

9. By said contract, MM&A was engaged as the General Counsel to the Kaw Nation and commenced performing the legal services and incurring expenses as required therein.

10. The Kaw Nation subsequently paid MM&A monthly invoices consistent with the contract until the election of a new Chairman of the Kaw Nation in September.

11. In violation of directives from the Executive Council, his oath of office, and the Kaw Nation Constitution, the new Chairman has refused to pay MM&A invoices for professional services rendered and expenses incurred under the contract.

12. The Kaw Nation has failed to compensate MM&A for services performed in the months of September, October, November and December of 2002 even though the majority of the duly elected governing body of the Kaw Nation voted to compensate MM&A for the services performed.

13. In action taken December 12th, the Kaw Nation Executive Council confirmed that MM&A invoices for September, October, and November were for services and expenses incurred under the contract. See Exhibit A attached.

14. As of December 31, 2002, the Kaw Nation owed MM&A $45,657.30 for services performed and expenses incurred under the contract.

15. Because this is a civil action to recover for services under a written contract, MM&A is entitled to "a reasonable attorney fee to be set by the court." 12 O.S. § 936.

PRAYER

WHEREFORE, Plaintiff Michael Minnis & Associates, P.C. prays for judgment against the Defendant Kaw Nation for $45,657.30, prejudgment interest as allowed by law, postjudgment interest, a reasonable attorney fee, costs associated with bringing this action and such other relief as this Court may deem reasonable and proper.

MICHAEL, MINNIS & ASSOCIATES, P.C.

By: /s/ Michael Minnis

Michael Minnis, OBA #6251
David McCullough, OBA #10898
Jason Thompson, OBA #19379
100 N BROADWAY AVE STE 3160
OKLAHOMA CITY, OK 73102-8868
(405) 235-7686 FAX 232-5460
mm&a@swbell.net
ATTORNEYS FOR PLAINTIFF
MICHAEL MINNIS & ASSOCIATES, P.C.

EXHIBIT A

[LOGO] **KAW NATION**
Drawer 50
Kaw City, OK 74641
(580) 269-2552 Fax (580) 269-2301

KAW NATION EXECUTIVE COUNCIL
RESOLUTION NO. 02-98

A RESOLUTION EXPLICITLY WAIVING SOVEREIGN IMMUNITY AS TO SUIT BY MICHAEL MINNIS AND ASSOCIATES, P.C., IN THE STATE COURTS OF OKLAHOMA

WHEREAS, The Kaw Nation of Oklahoma is a federally recognized Indian Nation organized pursuant to the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967), and;

WHEREAS, The Kaw Nation adopted and ratified the Constitution of the Kaw Nation on July 7, 31, 1990, and this Constitution was approved and certified by the Secretary of the United States Department of Interior on August 14, 1990, and;

WHEREAS, The Kaw Nation Executive Council is the legislative body of the Kaw Nation authorized to act in and on all matters and subjects upon which the Tribe is empowered to act pursuant to KAW CONST., art. II, § 4(a), and;

WHEREAS, Michael Minnis and Associates, P.C., has been engaged as the General Counsel for the Kaw Nation pursuant to Executive Council Resolution 02-07, and;

WHEREAS, Michael Minnis and Associates, P.C. consistent with said contract has performed

services, incurred reasonable expenses, and submitted proper invoices to the Kaw Nation in September (invoice number 4625), in October (invoice number 4649), and in November (#4675) that have not been paid;

NOW, THEREFORE, BE IT RESOLVED THAT The Kaw Nation hereby explicitly waives sovereign immunity and submits to the jurisdiction of the courts of the State of Oklahoma solely to allow Michael Minnis and Associates, P.C. to sue the Kaw Nation for the recovery of attorney fees and expenses incurred under said contract and to pursue post-judgment remedies against the assets of the Kaw Nation.

BE IT FURTHER RESOLVED THAT, for the purpose of this waiver, service of summons on the Kaw Nation may be effected by serving either the Chairman, Vice Chairman or Secretary.

CERTIFICATION

The undersigned Secretary of the Kaw Nation and pursuant to the authority of Paragraph 5 Section 4 Article III of the Kaw Nation Constitution, hereby certifies that the above and foregoing resolution is a true, accurate and complete copy of a resolution duly adopted and approved on the 12th day of December, 2002, as an official act by quorum vote of the Kaw Nation Executive Council by a vote of: 4 for, 0 against, 0 abstentions, and 3 absent.

/s/ Martha Spotted Bear
Secretary

/s/ Jesse Mehojah
/s/ Clark Pepper
/s/ Clyde F. McCauley

EXHIBIT B

[LOGO] **KAW NATION**
Drawer 50
Kaw City, OK 74641
(580) 269-2552 Fax (580) 269-2301

KAW NATION OF OKLAHOMA
RESOLUTION NO. 02-07

A RESOLUTION APPROVING AND AUTHORIZING A GENERAL COUNSEL CONTRACT WITH MICHAEL MINNIS, P.C., ATTORNEY AT LAW, OF MICHAEL MINNIS & ASSOCIATES, P.C., OKLAHOMA CITY, OKLAHOMA.

WHEREAS, The Kaw Nation is a federally recognized Indian Nation recognized by the Secretary of the Interior as evidenced by an approved Constitution adopted and ratified on August 14, 1990, and

WHEREAS, The Executive Council is the governing body of the Kaw Nation, and

WHEREAS, The Executive Council has the duty and responsibility to act in the best interest of the Kaw Nation; and

WHEREAS, The Executive Council of the Kaw Nation has the power to enter into a contract with Michael Minnis and Associates, P.C. as legal counsel, to appear as such before all federal, tribal, and state courts, tribunals, departments, agencies and committees of the Congress and the state legislatures with respect to Kaw Nation and such other tribal matters as may be assigned to attorney by the Kaw Nation, and,

WHEREAS, The Executive Council of the Kaw Nation approves the fees and terms set forth in the contract with attorneys.

NOW, THEREFORE, BE IT RESOLVED, that the Executive Council of the Kaw Nation agrees to the contract agreement for a period of one (1) year beginning January 12, 2002 and ending January 12, 2003

CERTIFICATION

I, Wanda Stone, Chairperson of the Kaw Nation Executive Council, do hereby certify that said resolution was approved and adopted on 1/12, 2002, as an official act by quorum vote of the Kaw Nation Executive Council, and that the vote was 4 for; ___ against; 1 abstentions; and 1 absent.

/s/ Clyde F. McCauley, Vice Chairman
Wanda Stone, Chairperson

ATTEST: /s/ Joann O'Bregon [SEAL]
Joann O'Bregon, Secretary

United States Department of the Interior
Bureau of Indian Affairs
Southern Plains Region
P. O. Box 368
Anadarko, Oklahoma 73005

[LOGO]
IN REPLY REFER TO:
Tribal Government Services

Clyde McCauley, Vice-Chairman
Kaw Nation
1404 Coronado
Ponca City, OK 74601

APR - 8 2003

Dear Mr. McCauley:

In response to your letter dated April 7, 2003, we have been provided a copy of the decisions in the purported recalls of yourself and Clark Pepper from the Kaw Executive Council. Since these actions were taken through the Tribal Court after February 28, 2003, the date the Central Office accepted the retrocession of the Tribal Court under Kaw Executive Council Resolution No. 96A, we will not be able to accept the actions as valid.

At the present time, the Kaw Executive Council is still composed, for the purposes of doing business with the Bureau of Indian Affairs, as follows:

Chairman – Guy Munroe
Vice Chairman – Clyde McCauley
Secretary – Martha Spotted Bear
Members – Clark Pepper, Wanda Stone,
Jesse Mehojah, and Guyetta Martin

Regarding your question on "who controls the financial aspect of the Kaw Nation", under the Constitution of the Kaw Nation, the general responsibility for the use and management of funds lies with the Treasurer and the Executive Council. The Treasurer is responsible for the

accounting and reporting of funds. The Executive Council has an overall responsibility for the use of funds under the Nation's control since its formal actions are required in all matters, see Article II Section 3(h).

Copies of this letter are being provided all members of the Kaw Executive Council for their information. Should you have questions, please contact Terry Bruner at 405/247-6673, extension 209.

Sincerely,
SGD. ROSE L. ROBERSON

Acting Regional Director

cc: Pawnee Agency
All member of Kaw Executive Council
DRD's file copy
RD's file copy
Subject/chrony(C:\kaw_kecmembers.wpd)
TBRUNER:cd 04/07/03

IN THE DISTRICT COURT
IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

MICHAEL MINNIS & ASSOCIATES, P.C., a corporation,	)	
Plaintiff,	)	Case No. CJ-2003-118
v.	)	
KAW NATION, a Federally-recognized Indian tribe,	)	
Defendant.	)	

CONFESSION OF JUDGMENT
(Filed Feb. 27, 2003)

COMES NOW, Clyde McCauley, Vice Chairman of the Kaw Nation, by and through the authority granted me by Kaw Nation Executive Council Resolution No. 03-05, a true and correct copy of which is attached hereto, and consistent with 12 O.S. § 689, herewith on behalf of the Kaw Nation personally appearing confesses judgment on the pleadings. Judgment may be entered in favor of Michael Minnis & Associates, P.C. and against the Kaw Nation for $45,657.30 plus pre-judgment interest, post-judgment interest, and costs including a reasonable attorney's fee.

KAW NATION

By: /s/ Clyde F. McCauley
Clyde McCauley, Vice Chairman

STATE OF OKLAHOMA)
)
COUNTY OF OKLAHOMA)

This instrument was signed under oath before me on this 27th day of February, 2003, by Clyde McCauley as Vice Chairman of the Kaw Nation on behalf of whom this instrument was executed.

/s/ Jasmine Georgian
Notary Public

[seal]
My Commission expires: 4/21/04

The Plaintiff, Michael Minnis & Associates, P.C., by and through its president, hereby assents to the above and foregoing confession of judgment.

/s/ Michael Minnis
Michael Minnis, President

[LOGO] **KAW NATION**
Drawer 50
Kaw City, OK 74641
(580) 269-2552 Fax (580) 269-2301

KAW NATION EXECUTIVE COUNCIL
RESOLUTION NO. 03-05

A RESOLUTION ACKNOWLEDGING RECEIPT OF SUMMONS AND ADMITTING LIABILITY TO MICHAEL MINNIS AND ASSOCIATES, P.C., FOR ATTORNEY FEES, COSTS AND ACCRUED INTEREST SOUGHT IN OKLAHOMA DISTRICT COURT SUIT

WHEREAS, The Kaw Nation of Oklahoma is a federally recognized Indian Nation organized pursuant to the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967), and;

WHEREAS, The Kaw Nation adopted and ratified the Constitution of the Kaw Nation on July 7, 31, 1990, and this Constitution was approved and certified by the Secretary of the United States Department of Interior on August 14, 1990, and;

WHEREAS, The Kaw Nation Executive Council is the legislative body of the Kaw Nation authorized to act in and on all matters and subjects upon which the Tribe is empowered to act pursuant to Kaw Const., art. II, § 4(a), and;

WHEREAS, The Executive Council is composed of the following officers: a Chairman, Vice Chairman, Secretary, and four Council Members according the Kaw Const. art. II, § 3(a); and

WHEREAS, The duly-elected officers of the Executive Council are: Chairman Guy Munroe, Vice

Chairman Clyde McCauley, Secretary Martha Spotted Bear, Council Member Clark Pepper, Council Member Jesse Mehojah, Council Member Guyetta Munroe-Martin, and Council Member Wanda Stone; and

WHEREAS, The Executive Council decides business by a majority vote and a quorum is four or more members [Kaw Nation Const. art. II, § 3(h)]; and

WHEREAS, Michael Minnis and Associates, P.C., has been engaged as the General Counsel for the Kaw Nation pursuant to Executive Council Resolution 02-07 and a subsequent contract that remains in force until and unless terminated by the Executive Council or the attorney as therein provided; and

WHEREAS, Michael Minnis and Associates, P.C. consistent with said contract and resolution has provided legal services to the Kaw Nation, incurred reasonable expenses, and submitted proper invoices amounting to a total of $45,657.30 to the Kaw Nation in September (invoice number 4625) in October (invoice number 4649) in November (invoice number 4675) and in December (invoice number 4701); and

WHEREAS, The Executive Council has consistently directed Chairman Guy Munroe to pay said invoices, but he has wrongfully refused to make such payments in violation of the Kaw Nation Constitution, Executive Council directions, and the Kaw Nation contract with Michael Minnis and Associates, P.C.; and

WHEREAS, The Executive Council is Resolution 02-98 waived sovereign immunity to authorize Michael Minnis and Associates, P.C. to bring suit in Oklahoma District Court to obtain a judgment for said invoices; and

WHEREAS, Michael Minnis and Associates, P.C. consistent with said resolution filed a suit in the District Court of Oklahoma County styled and numbered *Michael Minnis & Associates, P.C. v. Kaw Nation*, No. CJ-2003-118; and

WHEREAS, The Kaw Nation herewith acknowledges receipt of summons and a copy of the petition filed in the District Court of Oklahoma in the County of Oklahoma case number CJ-2003-118 on January 11, 2003, by service on the Vice-Chairman and on January 13, 2003, by service on the Chairman; and

WHEREAS, Michael Minnis and Associates, P.C. in said suit seek a judgment for said invoices to the Kaw Nation that have not been paid; and

WHEREAS, The Kaw Nation owes the sums sought in said suit;

NOW, THEREFORE, BE IT RESOLVED THAT The Kaw Nation hereby acknowledges receipt of good service in a suit in the District Court of Oklahoma in the County of Oklahoma case number CJ-2003-118.

BE IT FURTHER RESOLVED THAT, The Kaw Nation acting by and through the Executive Council hereby authorizes judgement to be entered in said case in favor of Michael Minnis & Associates, P.C. and against the Kaw Nation for the sum of $45,657.30 plus pre-judgment and post judgment interest as authorized by law and the costs of bringing the suit including a reasonable attorney fee.

Vice Chairman Clyde McCauley is hereby authorized to sign on behave of the Kaw Nation any pleadings or documents, if any, that may be necessary to effect this authorization.

CERTIFICATION

The undersigned Secretary of the Kaw Nation and pursuant to the authority of Paragraph 5 Section 4 Article III of the Kaw Nation Constitution, hereby certifies that the above and foregoing resolution is a true, accurate and complete copy of a resolution duly approved on the 25 of January, 2002, as an official act by quorum vote of the Kaw Nation Executive Council by a vote of: 4 for, 2 against, 0 abstentions, and 0 absent.

/s/ Clyde F. McCauley
Clyde McCauley,
Vice Chairman

/s/ Martha Spotted Bear
Martha Spotted Bear,
Secretary

/s/ Clark Pepper
Clark Pepper, Member

/s/ Jesse Mehojah
Jesse Mehojah, Member

(2)

No. 03-1714

Supreme Court, U.S.
FILED
JUL 28 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHAEL MINNIS & ASSOCIATES, P.C.,
Petitioner,

v.

KAW NATION,
Respondent.

On Petition for A Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma, Division III

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHEAL C. SALEM
Counsel of Record
SALEM LAW OFFICES
111 North Peters, Suite 100
Norman, OK 73069
(405) 366-1234

Typography by *The Legal Printing Co*
Norman, Oklahoma • (405) 321-5453

QUESTION PRESENTED

1. Whether this Court should overturn the decision of the Oklahoma Court of Civil Appeals, Division III, which affirmed dismissal of Petitioner's fee collection suit against the Kaw Nation Indian Tribe without prejudice to its refiling in the tribal court, when the validity of an alleged waiver of sovereign immunity was questioned and Respondent presented uncontroverted evidence which showed:

   A. A decision of the Kaw Nation Supreme Court which held that the alleged waiver of sovereign immunity, confession of judgment, and dismantling of the tribal judicial system were wholly void as in violation of the Tribe's Constitution and of preliminary injunctions issued by the tribal district court;

   B. The underlying contract in suit contained an express stipulation to the jurisdiction of the tribal courts;

   C. The challenge to state court jurisdiction was authorized by the General Council of the Tribe;

   D. A stay of a claimed retrocession of judicial functions; and

   E. An existing, functioning tribal judicial system.

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INTRODUCTION

KAW NATION, a federally recognized self-governing Indian Tribe (herein Kaw Nation, Nation, Kaw Tribe, or Tribe), responds to the Petition for Writ of Certiorari filed by Michael Minnis & Associates, P.C. (Minnis).

Minnis seeks review of a decision of the Oklahoma Court of Civil Appeals, Division III (CCA), which affirmed a state district court dismissal of its fee collection state court petition without prejudice to its refiling in the Kaw Nation tribal court.[1]

The Petition should be denied. Minnis has raised no substantial federal question to justify a grant of certiorari under Supreme Court Rule 10.

Dismissal without prejudice to refiling in tribal court was not, as Minnis complains, an adjudication of internal tribal issues. Rather, it was recognition by the state district court and the CCA that the alleged waiver of sovereign immunity and the alleged confession of judgment, both of which the Tribe had adjudicated to have been wholly void, should not now be relitigated in state court. This is not an unusual or unexpected result. In the underlying contract that Minnis sought to enforce in state court, Minnis stipulated to jurisdiction in the courts of the Kaw Nation.

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[1] The decision is now reported as *Michael Minnis & Associates, P.C. v. Kaw Nation*, 90 P.3d 1009, 2004 OK CIV APP 36 (Okla.Civ.App., Div. 3, Dec 18, 2003) (See App. 1)

Despite political ambitions by Minnis and its clients to abolish the tribal judiciary and substitute a Court of Indian Offenses (CFR Court) operated by the Bureau of Indian Affairs (BIA) of the Department of Interior (DOI), the Kaw tribal courts remained open and operating by proper legal process.

Minnis filed a federal action seeking to close the Kaw Nation courts. Instead, the U.S. District Court for the Western District of Oklahoma (DCWDO) held that the Kaw tribal court had the right to determine its own jurisdiction and eventually dismissed the action for failure to present a federal question since the issues raised matters of internal tribal dispute.

After the DCWDO ordered dismissal and dissolved a temporary restraining order against a tribal judge, the Kaw Nation Supreme Court issued a briefing schedule, determined that Kaw Nation courts had jurisdiction, held that Minnis's clients could not abolish the Kaw judiciary, a constitutional branch of the Nation, and also held the Minnis waivers of sovereign immunity void.

The Oklahoma CCA declined relitigation of those issues and did not ignore determinations of the Secretary of the Interior which Minnis claimed were controlling. The contentions Minnis relied upon were in a brief filed by a U.S. Attorney on behalf of the DOI in a parallel litigation. Minnis fails to discuss the decision of a DOI administrative law judge (ALJ) who acted upon appeals brought by Guy Munroe and other members of the Tribe's Executive Council to halt the transfer of judicial authority to the CFR court: the

ALJ determined that the Secretary's attempt to reassume jurisdiction over Kaw Nation judicial functions was improper and violated the Tribe's Constitution.

Guy Munroe is not a "stranger" to this proceeding as Minnis contends. Munroe is the Tribal Chairman charged by the Kaw Nation Constitution to cause the laws of the Kaw Nation to be faithfully executed. He is a natural representative of the Nation and the Nation's interests.

Munroe entered the action for the Nation not only in his own right as a tribal representative, but at the direction of the governing body General Council (GC) of the Nation which opposed numerous actions of certain members of the Executive Council (EC) represented by Minnis. The GC approved a resolution which opposed the waiver of sovereign immunity and specifically authorized Munroe to assert sovereign immunity and defend the Nation in the action brought by Minnis.

A consideration and grant of the Minnis Petition would require that this Court find some substantial federal interest in Minnis's simple refusal to pursue his alleged contract claim in tribal court despite his bargained-for stipulation of tribal court jurisdiction as a material term of the contract. It would require an examination and review of internal tribal matters which are nonfederal matters beyond the jurisdiction of this Court at this stage of the litigation.

As such, this case falls far outside the boundaries of this Court's Rule 10. The Petition should be denied.

COUNTER-STATEMENT OF THE CASE

Respondent does not agree that the statement of the case presented by Petitioner is an accurate or complete statement of facts material to consideration of the questions presented by this case. While the Oklahoma CCA's recitation of facts is an accurate statement of those facts necessary to its decision (*Pet.*, App. 2-8), Petitioner has omitted or incompletely stated essential facts in the body of its Petition which belie its allegations of tribal lawlessness.

Under Rule 15.2 of the Rules of this Court, the Respondent must correct ". . . any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Accordingly, the Court's attention is respectfully drawn to the following additional information from the appellate record presented to the Oklahoma CCA.[2]

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[2] Citation is made herein to two parts of the record:

Minnis filed a tabbed Record on Accelerated Appeal which will be referenced as (Rec., Tab ___, p. ___);

Respondent filed a Supplemental Record on appeal which will be referenced as (Supp. Rec., Tab ___, p. ___).

A. THE KAW NATION GOVERNMENT.

This action arose during an internal conflict of governance between members of the Executive Council (EC) of the Kaw Nation in dispute with the Chairman/CEO of the Kaw Nation and the General Council (GC) of the Kaw Nation. Among other matters, the conflict involved actions of four members of the EC and the validity and continued operation of the Kaw Nation judicial system.

The Kaw Nation is a federally-recognized sovereign Indian Tribe organized pursuant to the *Oklahoma Indian Welfare Act* of June 26, 1936, 49 Stat. 1967, codified at 25 U.S.C. §501, *et seq.*

The Kaw Nation is autonomous and possessed of inherent powers of self-government under a Constitution adopted by the Tribe and approved by the Deputy Assistant Secretary of Indian Affairs of the DOI. (Supp. Rec., Tab 10, Ex. B, p. 16)

Guy Munroe is the Chief Executive Officer of the Kaw Nation and is charged with various responsibilities for the Tribe. Under Article III, Section 2 of the Kaw Constitution, Munroe has authority over and the obligation for ". . . general supervision of the affairs of the General Council and Executive Council and shall perform all duties pertaining to the office of Chairman, including the authority to cause laws of the Kaw Nation to be faithfully executed and obeyed, and to carry out obligations entrusted to the office of Chairman." (Supp. Rec., Tab 10, Ex. B, p. 6)

The General Council (GC) is a governing body under the Kaw Constitution and is an assembly ". . . of all members of the Kaw Nation, not adjudged mentally incompetent by a court of competent jurisdiction, who are eighteen (18) years of age or older in council assembled." Kaw Constitution, Art. II, Sec. 1 (Supp. Rec., Tab 10, Ex. B, p. 2). In essence, the GC is a general Kaw tribal meeting.

The Executive Council of the Kaw Nation (EC) is a governing body which consists of seven members: Chairman, Vice-Chairman, Secretary, and four (4) Council Members elected pursuant to an election ordinance approved by the General Council. Kaw Constitution, Art. II, Sec. 3. (Supp. Rec., Tab 10, Ex. B, p. 3)

The Kaw Constitution provides for a Supreme Court and inferior courts established by law as courts of general jurisdiction. Kaw Constitution, Art. V, Sec. 1, 2 (Supp. Rec., Tab 10, Ex. B, p. 10)

The Kaw Courts have special power of judicial review over actions of the General Council, Executive Council, or any other officers to determine whether those actions are prohibited by federal law, the Kaw Constitution, or the laws of the Kaw Nation, and may enter injunctions or declaratory judgments when such violations are found. Kaw Constitution, Art. V, Sec. 6 (Supp. Rec., Tab 10, Ex. B, p. 11)

B. THE INTERNAL DISPUTE.

Four members of the Executive Council (EC4), who were and continue to be represented by Minnis, became

dissatisfied with decisions of the Kaw Nation courts including ongoing proceedings in removal instituted by Munroe.[3]

In response to various rulings unfavorable to their position, the EC4 sought to abolish operation of the Kaw Nation judiciary and transfer these functions to a Court of Indian Offenses operated under the Code of Federal Regulations (CFR) by the Bureau of Indian Affairs (BIA) of the Department of Interior (DOI), an action opposed by Chairman Munroe and which caused considerable dispute within the Nation, especially the General Council.

Tribal courts continue to operate despite the alleged vote of abolishment by the EC4. Munroe and another EC member sought and received injunctions from the Tribal District Court which enjoined votes of abolishment, the waiver of sovereign immunity, and payment to Minnis. (Supp. Rec., Tab 10, Ex. C and D) In December of 2002, Munroe brought suit in the Tribal District Court on behalf of the Tribe to challenge fees paid to Minnis as in violation of the Kaw Constitution in that the EC4 had a material interest in payment of those fees. Munroe obtained service on Minnis, and Munroe's action predated and was pending at the time of filing of Minnis's fee case in the Oklahoma County District Court. The tribal court case number is No. CIV-02-27 and a copy of the petition is in the record on appeal. (Supp. Rec., Tab 10, Ex. A)

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[3] The EC4 members are Clyde McCauley, Clark Pepper, Martha Spotted Bear, and Jesse Mehojah and are identified in the alleged Resolutions submitted by Minnis. (Rec., Tab 4, Ex. E)

Munroe had instituted removal proceedings against members of the EC4. The Kaw Constitution provides for removal proceedings for members of the Executive Council by action filed in the Kaw District Court. Kaw Constitution, Art. IV, Sec. 2 (Sup. Rec., Tab 10, Ex. B, p. 8) Munroe was supported by two other members of the EC. These removal proceedings were subsequently completed as to McCauley and Pepper, resulting in orders of their removal. See *In the Matter of McCauley*, No. CIV-02-12, DC Kaw Nation, Order of Removal (Supp. Rec., Tab 5, Ex. O); *In the Matter of Pepper*, No. CIV-02-13, DC Kaw Nation, Order of Removal (Supp. Rec., Tab 5, Ex. P).

Mr. McCauley and Mr. Pepper did not appeal the Orders of Removal. Their vacancies were filled for the remainder of the unexpired term by majority vote of the General Council at a regular meeting. See Kaw Constitution, Art. II, Sec. 3(d)(Supp. Rec., Tab 10, Ex. B, p. 4) and General Council Resolution 03-42, (Supp. Rec., Tab 5, Ex. B)

C. THE MINNIS FEDERAL SUIT AND THE DECISION OF THE KAW SUPREME COURT.

Despite the preliminary injunctions of the tribal district court, the EC4 voted to abolish the tribal courts and transfer the judicial function to the CFR court operated by the BIA, claiming in part that certain tribal judges had never been confirmed.[4]

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[4]At its December 15, 2002 meeting, the GC confirmed Phil Lujan as (continued...)

To enforce the resolution of abolishment, Minnis, on behalf of the EC4, filed an action in the U.S. District Court for the Western District of Oklahoma (DCWDO) against Tribal District Judge Phil Lujan, Munroe, and justices of the Kaw Nation Supreme Court seeking to enjoin their exercise of judicial authority. After filing of Minnis's federal suit, the Kaw Supreme Court entered an order staying the docket of the Tribal District Court. (Supp. Rec., Tab 4, Ex. O, p. 6) Nevertheless, at a hearing voluntarily attended by Lujan, U.S. District Judge Vickie Miles-LeGrange entered a temporary restraining order.

Munroe and Lujan filed motions to dismiss. After response, Judge Miles-LeGrange dismissed the action and dissolved the TRO, finding that because the existence of the tribal courts was facially apparent and the resolution of the question of the judicial officers' authority under the Kaw Constitution was an internal tribal matter, the tribal courts were entitled to determine their own jurisdiction before any federal review. (Supp. Rec., Tab 4, Ex. L, p. 13-15)

Minnis filed a Motion for Order for Relief from Judgment and a Motion to Amend the Judgment. The District Court then sought briefing and subsequently held that the question involved was the constitutional authority of Kaw

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[4](...continued)
Tribal District Court Judge. (Supp. Rec. Tab 4, Ex. M, p. 6-10 (Minutes of GC Meeting). At a special meeting on February 9, 2003, the GC passed Resolution No. 3-13 and reconfirmed Charles Tripp, Charles Morris and Michael McBride as Justices of the Supreme Court. (Supp. Rec. Tab 4, Ex. N)

judges which was purely intra-tribal in nature and not within the jurisdiction of the court as a federal question, and dismissed the action completely. (Supp. Rec., Tab 6, Ex. G, p. 6-7) A final judgment was entered.[5] (Supp. Rec. Tab 6, Ex. H)

After the federal district court dissolved its TRO, the Kaw Nation Supreme Court (KNSC) ordered further briefing.

The KNSC subsequently entered an order that determined that the tribal district judge was properly seated; upheld the validity of the removal proceedings and of the temporary restraining orders and preliminary injunctions entered by Judge Lujan against the EC4; disqualified Minnis from the representation of the EC4; acknowledged its explicit authority under the Kaw Constitution to review decisions of the Executive and General Councils; upheld the invalidity of a variety of resolutions passed by the EC4 (including the Court Abolishment Resolution) because the EC4 were facing removal proceedings, the resolutions were taken to thwart the adjudicatory powers of the court and to stop the judge and justices from exercising proper authority, and that each of the EC4 had a personal interest in the resolutions that they voted upon in defiance of the court injunction.[6] The Kaw

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[5] Minnis has appealed this decision to the Tenth Circuit. *Kaw Nation, ex rel. v. Lujan, et al.*, No. 03-6213, Tenth Circuit. The matter is still pending.

[6] The actions of the EC4 and Minnis's arguments based on them suffer from other constitutional infirmities. Under the Kaw Nation Constitution, the power of the Executive Council to take certain actions

(continued...)

Supreme Court also dismissed all contempt citations then pending. (Supp. Rec., Tab 5, Ex. Q)

After the Kaw Supreme Court decision, the Kaw District Court set the removal proceedings for McCauley and Pepper for hearing and issued notice. After hearing, the Court removed both McCauley and Pepper. (Supp. Rec., Tab 5, Exs. O, P)

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[6](...continued)
is subject to approval of the Kaw General Council. See Kaw Constitution, Art. II, Sec. 4(b)(2)(Supp. Rec. Tab 10, Ex. B, p. 6) Included within these restrictions are the "establishment, enactment, amendment, or repeal of ordinances respecting tribal elections or recall and removal of tribal officers," which are not effective unless approved by the General Council. This was the holding of the Kaw Nation Supreme Court in its 3/5/03 Order. (Supp. Rec. Tab 5, Ex. Q, p. 20-21):

> . . . Art. II, §2(b) prohibits the Executive Council from taking certain actions without approval of the majority vote of the General Council. One of those actions is §2(b)(2) "[t]he establishment, enactment, amendment, or repeal of ordinances respecting tribal elections or recall or **removal of tribal officers.**" (emphasis added). The pending adjudication of the removal actions is well within this constitutional provisions. We find that the Executive Council's actions on December 12, 2002 were calculated to interfere with court proceedings considering removal of each member who voted on the measures. Therefore, all such resolutions "shall be of no effect until the General Council has approved them." Art. II, §2(b). No approval followed. On December 15, 2002, the General Council took just the opposite action in approving the selection of Judge Lujan as the District Court Judge.

D. ADMINISTRATIVE APPEALS OF DOI ATTEMPTS TO TAKE OVER TRIBAL JUDICIAL FUNCTIONS.

Minnis and the EC4 enlisted the BIA and Office of Self-Governance (OSG) in the DOI in the takeover ("retrocession") of the courts. The BIA issued letter rulings indicating it would assume judicial authority of the Tribe.

The Kaw Nation through Chairman Munroe and other members of the Executive Council, Wanda Stone and Guyetta Monroe-Martin, appealed these decisions through administrative procedures of the DOI to the Interior Board of Contract Appeals (IBCA).[7] Despite the administrative appeal, the BIA failed to stay its actions pending appeal.

After an extended process, Administrative Law Judge Bernard Parrette (with the concurrence of Chief Administrative Judge Candida S. Steel) overturned the decisions of the OSG and BIA which had refused to acknowledge the Kaw judiciary, and held that the authority to resolve these issues lay only with the Tribe:

> As the DCWD [District Court Western District] has tried to make clear in all of its relevant decisions, these

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[7] Munroe's actions were supported by EC Resolution No. 3-46 which affirmed sovereignty of the Kaw Nation and the continued operation of the constitutionally established tribal court system, and disclaimed any request for establishment of a CFR Court (Supp. Rec., Tab 5, Ex. C) and were further supported by a parallel GC Resolution No. 3-44 on the same subject matter. (Supp. Rec., Tab 5, Ex. D) The GC Resolution passed by a vote of 61 for, 0 against, 3 abstentions.

> are manifestly intra-tribal political matters. To deny the Nation the right to resolve them internally is to destroy the very essence of self-determination. The Department had insufficient reason to become involved at the outset, much less on the basis of any kind of urgency. From the record, it appears that the reasons for OSG's intervention were some questionable assertions by the EC4 group and its representatives, which OSG and BIA apparently accepted at face value without notice or investigation.
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> Appeal of Kaw Nation, ex rel. Guy Munroe, et al. and the Kaw Nation General Council, IBCA 4455A/03, Interior Board of Contract Appeals, July 31, 2003, (Supp. Rec., Tab 7, Ex. A, p. 16)

Judge Parrette held that the Kaw Nation's tribal judiciary was part of its government structure and not a program. The BIA claim that civil and criminal jurisdiction had been "re-assumed" was a violation of the Nation's Constitution. (Supp. Rec., Tab 7, Ex. A, p. 13-14) Judge Parrette also held that the Department's agencies failed to stay the effectiveness of their decisions during the process of appeal and that arguable efforts were made to cut-off the appeal rights of the Kaw Nation. (Supp. Rec., Tab 7, Ex. A, p. 13)

E. THIS ACTION ON FEE COLLECTION.

To obtain payment for fees incurred on behalf of and at the direction of the EC4 and apparently because Chairman Munroe had already initiated litigation regarding the fees in Tribal District Court, Minnis collusively engaged his clients (McCauley, Pepper, Spotted Bear, and Mehojah) to execute an alleged waiver of sovereign immunity. This was an apparent attempt to subject the Kaw Nation to collection actions in the Oklahoma County District Court and to avoid internal tribal processes, either in the action already instituted by Chairman Munroe against Minnis in the Tribal District Court or in any separate action he may choose to file in Tribal Court.

Although Minnis has included the original petition from the Oklahoma State District Court as an exhibit (App. 26-33), Minnis did not include Exhibit C attached to that petition, which is the fee contract for the underlying action. It is part of the original record. (Rec., Tab 2, Ex. C)

What is materially omitted from discussion in the Minnis Petition for Writ of Certiorari is a stipulation of tribal court jurisdiction included in Paragraph 15 of the Contract. (Petition, Rec., Tab 2, Ex. C, p. 5)

Here is how the clause was described in the Oklahoma Court of Civil Appeals decision, Footnote 6 (App. 3):

> On page five of the contract, the parties struck the original typewritten ¶ 15, of the agreement, providing:

> Immunity. For the limited purpose of allowing [MM&A] to enforce this contract, the Kaw Nation hereby waives immunity to suit and agrees that suit may be filed in the state District Court for Oklahoma County. For the purposes of enforcing any money judgment obtained by [MM&A] hereunder, the Kaw Nation also waives governmental immunity as to its non-federal, non-trust assets.

The parties substituted a hand-written ¶ 15, which provided:

> It is understood and mutually agreed that as a material and substantial consideration of this agreement that the parties mutually stipulate to the jurisdiction of the courts of the Tribe.

Minnis filed the petition in Oklahoma County District Court. Summons was issued and a court clerk docket entry on January 22, 2004 indicates that Guy Munroe was served personally on January 13, 2003. (Rec., Tab 1, p. 2)

The purported sovereignty waiver and confession of judgment were executed by the EC4 members who are also individual clients of Minnis and whom Minnis continues to represent in litigation in the appeal of the *Kaw Nation, ex rel v. Lujan* case now pending in the Tenth Circuit. See Footnote 5.

Munroe entered the action to defend on behalf of the Tribe. Munroe filed a Motion to Dismiss based upon

improper venue, tribal sovereignty immunity, prior filing in other court involving same matter, contractual stipulation of tribal court jurisdiction, invalidity of alleged waiver of sovereignty, and an alleged exhaustion of tribal remedies/conflicts of law. (Supp. Rec. Tab 1) Munroe's Motion was supported by his Affidavit. (Supp. Rec., Tabs 1, 10)

Besides Munroe's authority as Tribal Chairman to represent the Tribe in litigation, Munroe's actions were specifically authorized by GC Resolution No. 3-15 (authorizing the "Tribal Chairman to Take Action on Behalf of the Tribe with Regard to the Case of Michael Minnis v. Kaw Nation, No. CJ-2003-118, DC Oklahoma County.")

This Resolution reaffirmed the operation of the Kaw Nation Court System and declared void an alleged Resolution by the EC4 to waive the Tribe's sovereign immunity to permit suit in state court. The Resolution passed 86 to 0 with 1 abstention. (Supp. Rec., Tab 4, Ex. H)

The GC also passed Resolution No. 3-16 demanding the resignations of the EC4 and if they refused, it directed the Chairman to expedite court procedures leading to their removal for mismanagement. The Resolution also passed 86 to 0 with 2 abstentions. (Supp. Rec., Tab 4, Ex. I)

F. REFERENCES BY MINNIS NOT INCLUDED WITHIN THE RECORD.

Minnis has included some references in its Petition which are not part of the Oklahoma CCA record and asks this

Court to rely upon materials and argument not submitted to the CCA. This includes the references to 25 C.F.R. §11.100 (2003)(App. 18) and 29 Federal Register 22728 (April 29, 2003)(App. 19). Although these matters may be subject to judicial notice upon proper request, exhibit copies of these documents were not part of the record in the CCA, nor was argument relying upon their subject-matter presented. Respondent objects to their inclusion and the separate argument advanced in reliance on these exhibits. See *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 759-60 (1995)(No review for issue not decided by circuit court nor presented to Supreme Court).

Even if this Court does give consideration to the Notice at 29 Federal Register 22728 (App. 19), its efficacy is suspect in light of the ALJ finding that it was error and a violation of the Kaw Nation Constitution for the BIA to reassume " . . .jurisdiction over civil and criminal matters that occur within the jurisdictional area of the Kaw Nation" and that " . . .it appears that the Assistant Secretary was either badly misinformed or ill-advised as to the urgency of the misnomered 'reassumption.' "[8] (Supp. Rec., Tab 7, Ex.

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[8] Minnis contends in its Petition that because the Kaw Nation is still listed in 25 C.F.R. §11.100 as a CFR Court, " . . . that no evidence supports the conclusion that a Kaw Nation judicial system has been recognized by the federal government." (Pet. 11)

A contention of "no evidence" is as silly as it is incorrect. The Assistant Secretary published a notice that the "Kaw Nation Executive Council passed a motion to return court function to the Bureau of Indian

(continued...)

A, p. 14) The ALJ decision was appealed by Minnis to the Federal Circuit, even though its clients were denied the right to intervene by the ALJ. The decision has not been reversed.

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[8](...continued)
Affairs" (App. 24); that the "Office of Self-Governance . . . advised the Kaw Nation that the funding for the tribal court was being withdrawn" and that the BIA CFR Court would "reassume jurisdiction over matters arising within the Kaw Nation"; "The Kaw Nation's retrocession and closing of its tribal courts creates a jurisdictional vacuum"; and the BIA "must immediately reassume judicial jurisdiction within the Indian country of the Kaw Nation of Oklahoma, until such time as the Nation reestablishes its court in accordance with 25 CFR 11.100(c)." Such references to "return," "the funding for the tribal court," "reassume jurisdiction," "retrocession and closing," "reassume judicial jurisdiction," and "reestablishes its court" all contribute substantial evidence that the federal government recognized a Kaw Tribal Court, because there would have been no need to re-assume any judicial functions or activate a CFR court if tribal courts never existed. (App. 25)

REASONS FOR DENIAL OF THE WRIT

1. NO FACTORS JUSTIFY EARLY REVIEW BY THIS COURT OF A MOTION TO DISMISS SUSTAINED WITHOUT PREJUDICE TO REFILING IN A FORUM PREVIOUSLY AGREEABLE TO BOTH PARTIES.

This action presented to the Oklahoma district court and the CCA on a motion to dismiss contesting an alleged waiver of sovereign immunity.

The disposition by the state district court was dismissal in favor of refiling in the Kaw Nation district court, the last agreed and undisputed forum, the forum best equipped to determine the validity of sovereignty waiver under Kaw law and procedures, and the jurisdiction in which litigation initiated by Guy Munroe involving the contract was already pending.

Because the forum choice and sovereignty waiver were contested, the state court's deferral to the Kaw tribal courts was an efficient and appropriate turn to avoid unwarranted adjudication by a state court of internal tribal procedures.

A court must decide jurisdiction before it may reach the merits of any claim:

> Questions of jurisdiction . . . should be given priority--since if there is no jurisdiction there is no authority to sit in judgment of anything else. See *Steel Co. [v. Citizens for a Better Environment], supra*, at [523 U.S. 83,] 93-

> 102 [(1998)]. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514 (1868).
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> *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 778-79 (2000)

Had the state district court proceeded and ultimately determined the sovereignty waiver invalid, it would have had no choice but to announce it had no jurisdiction and then dismiss.[9]

This Court requires "compelling reasons" for a grant of certiorari. U.S. S.Ct. Rule 10. The primary claim for relief raised by Minnis is that it is denied its new choice of forum in state court, when that new choice would change the previously agreed designated selection to a forum which, absent proof of an exception, is barred from exercising such jurisdiction. Because the forum selection paragraph of the contract was drafted by hand, it is obvious that selection of a tribal forum was material to the original contract. On this record, this Court is no better equipped to determine the

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[9] "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." 12 Okla. Stat. §2012(F)(3)

validity of the sovereign immunity waiver than the state district court, and for that reason the writ should be denied.

If Minnis prevails in tribal court on the issue of the sovereign immunity waiver and confession, Minnis need not remain in the tribal court but could then dismiss the claim (or counterclaim if raised in opposition to Munroe's Tribal Court action) and return to the Oklahoma District Court.

It is prudent for the state district court to defer to the last uncontested forum agreed to by the parties. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), where this Court held that forum-selection clauses, although not "historically . . . favored," are "prima facie valid." *Id.*, at 9-10. Minnis has not made the "strong showing" required to invalidate the forum selection to which the parties agreed and which in the absence of ". . . fraud, undue influence, or overweening bargaining power . . . should be given full effect." 407 U.S., at 12-13 (footnote omitted). This Court further generalized that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Id.*, at 15. *See Carnival Cruise Lines, Inc., v. Shute*, 499 U.S. 585, 591 (1991)

Finally, this Court has exercised a jurisprudential judgment not to become involved in cases in preliminary stages unless counseled by some special factor justifying intervention. *See e.g., Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993)(Denying certiorari on grounds that district court had not determined appropriate remedy as to admission of women to men-only college);

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 328 (1967). The Court generally stays its hand because review prior to final judgment may prolong litigation unnecessarily and result in piecemeal litigation. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511-12 (1950)

The Petition offers no sufficiently important reason for the expenditure of this Court's resources. See *Pennsylvania v. Bruder*, 488 U.S. 9, 14 (1988) (STEVENS, J. dissenting)("In my judgment this Court's scarce resources would be far better spent addressing cases that are of some general importance 'beyond the facts and parties involved,' *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (REHNQUIST, J., dissenting), than in our acting as "self-appointed . . . supervisors of the administration of justice in the state judicial systems . . .")

2. THE DECISION BELOW IS PLAINLY CORRECT IN THAT THE DECISIONS OF THE OKLAHOMA DISTRICT COURT AND CCA WERE CONSISTENT WITH THIS COURT'S DECISIONS REGARDING TRIBAL SOVEREIGNTY AND THE CONSTITUTION.

Minnis states that "[T]ribal immunity is a matter of federal law" and a tribal waiver of "sovereign immunity 'must be unequivocally expressed.' " (Pet. 7) Those principles favor the Oklahoma district court's decision: not only had the KNSC found the alleged waiver void, the

assertion of sovereign immunity raised by Munroe and the General Council makes any alleged waiver equivocal and thus ineffective. Consequently, the Oklahoma district court's dismissal was consistent with *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940).

Minnis misstates the holding of *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) in that the question decided by this Court was not whether three members of the business committee bound the Tribe. That the Tribe entered into the contract was apparently not in dispute.[10]

Instead, the question before this Court was whether an arbitration paragraph was a clear and unequivocal waiver of sovereign immunity and consent to entry of judgment in a court of competent jurisdiction. See 532 U.S. at 414, 415. ("We hold that, by the clear import of the arbitration clause, the Tribe is amenable to a state-court suit to enforce an arbitral award . . .")

C & L Enterprises actually lends support to the decision of Oklahoma district court in that the contest of validity of the waiver of sovereign immunity by Munroe and the General Council demonstrates that the waiver was not "unequivocal."

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[10] Such a misstatement is not casual. The reported decision reflects that Mr. Minnis was counsel in this Court for the losing Respondent Tribe. 532 U.S. at 413.

3. THE CONTENTION THAT THE ALLEGED DETERMINATIONS OF THE SECRETARY OF INTERIOR ARE CONTROLLING IS WITHOUT MERIT.

Minnis states that the Secretary of Interior made certain determinations which Minnis contends foreclose the Oklahoma district court and the CCA from deciding certain questions because their decision, Minnis contends, constitutes improper determinations of "internal tribal matters." (Pet. 9)

Petitioner contends that the CCA found that Munroe represents the Tribe and gave deference to purported "orders" by "three men" and by "Phil Lujan who claims to be a Kaw Nation judge." The Petitioner contends that the CCA relied on a March 4, 2003 "opinion" by these "non-justices" even though the Secretary had noted, Minnis says, that the KNSC itself had no legal existence. (Pet. 10-11)

First, the Counter-Statement of the Case (see p. 4) and the CCA decision show that by dismissing without prejudice to refiling in the Kaw Nation District Court, the Oklahoma District Court and the CCA properly respected the ability of the Kaw Nation to make its own internal decisions and did not abrogate any tribal decision.

Second, it is equally obvious that the federal district court proceedings in the Western District of Oklahoma authorized the processes of the KNSC and Judge Lujan to resolve the internal tribal governance dispute. (See p. 8) The Justices of the KNSC and Judge Lujan exercised proper judicial authority. Minnis was singularly unsuccessful in

obtaining a permanent or even a preliminary court injunction in the Western District of Oklahoma to stop the ongoing tribal judicial processes. Nor does the Petitioner seek relief against the tribal courts by directly challenging their jurisdiction in ongoing proceedings. Instead, Petitioner ignores the tribal courts and mounts collateral attacks on them at its peril.[11]

Third, Minnis's contentions of "controlling" declarations by the Secretary of the Interior are taken from a brief of argument of an Assistant U.S. Attorney in separate litigation (*Kaw Nation v. Norton*, No. CIV-2003-628-M (USDC WD Okla, 2003))[12] and are just that, an argument. Minnis

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[11] Nor should Minnis be permitted to choose a path into state court as a means of defiance of the authority of the tribal courts. The solution to a dispute over the validity of the Tribal Court's orders is to appeal, and not to disobey the orders in direct defiance of the Court's authority:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect. *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922); *Worden v. Searls*, 121 U.S. 14 (1887).
>
> *Maness v. Meyers*, 419 U.S. 449, 457-58 (1975)

[12] This suit was instituted by the Kaw Nation in the U.S. Western

(continued...)

ignores that these contentions of the Secretary now have no force of law and fails to disclose to this Court that they were the subject of reversal by the DOI ALJ as noted in the Counter-Statement of the Case, and are still on appeal.

Fourth, the contention by Minnis that Tribal Chairman Guy Munroe does not represent the Tribe is inconsistent with the decision of ALJ Parrette (Supp. Rec., Tab 7, Ex. A, p. 15) who recognized Munroe as the

> . . . official who not only headed the Executive Council but who was the Chief Executive Officer of the Nation as well. During the period of the pendency of this Appeal, he was expressly authorized by the General Council to challenge the Department's action accepting the purported 'retrocession.' He was also sustained by the General Counsel when he sought the removal of two of the EC4 group and then replaced them with new Executive Council members who agreed with him that the Nation's judicial functions should not be retroceded to BIA.
>
> Parrette ALJ, Decision (Supp. Rec., Tab 7, Ex. A, p. 15)

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[12](...continued)
District of Oklahoma seeking to enjoin ongoing actions by the BIA to dismantle the Kaw Nation Judiciary. While Judge Miles-LeGrange denied the Nation's preliminary injunction, ALJ Bernard Parrette subsequently granted a stay of the "retrocession" of the tribal courts and eventually entered a permanent order forbidding removal of the tribal courts. (Supp. Rec., Tab 6, Exs. I, J, K, L; and Tab 7, Ex. A)

4. PETITIONER DID NOT PROPERLY RAISE BELOW ITS CONTENTIONS OF VIOLATION OF DUE PROCESS OR DENIAL OF FAIR OPPORTUNITY TO LITIGATE SOVEREIGN IMMUNITY OR STANDING, AND THEY ARE WITHOUT MERIT.

Minnis contends that it was denied a fair opportunity to litigate sovereign immunity or standing. (Pet. 14-18)

The record in this action includes a copy of the Court Clerk's Docket Sheet[13] (No. CJ-2003-118, DC Oklahoma County)(Rec., Tab 1) which shows that approximately four months passed from the time of filing of the Petition until April 7, 2003 when the action was dismissed by Judge Carolyn Ricks.

During that time, Minnis filed responses to Munroe's Motion to Dismiss and other supplemental filings. Judge Ricks gave notice on March 20, 2003 that she would rule on the briefs. ("3/20/03 Judge Ricks: Motion to Dismiss Motion to Enter Jgmt-Ruling From the Briefs." (Rec., Tab 1, p. 3))

The last set of supplemental material filed by Munroe prior to the Court's ruling on the motions was filed on

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[13] The docket in the Oklahoma County District Court and the Court of Civil Appeals is available on a docket search at www.oscn.net, website of the Oklahoma Supreme Court.

March 14, 2003. Minnis filed a Response on March 20, 2003. (Rec., Tab 1, p. 3)

Minnis made no request for an evidentiary hearing after being given notice that the Court would rule from the briefs.

Once the district judge dismissed, Minnis filed a "Motion for Re-examination of Decision and to Vacate Appealable Orders." (Rec., Tab 9) It included additional exhibits including the Brief of the DOI and a letter from the BIA dated April 8, 2003. Minnis argued the sufficiency of the record. After reconsideration, the District Court denied the Motion for Re-examination on July 7, 2003. (Rec., Tab 8)

The Oklahoma Supreme Court has rules for an accelerated procedure for summary judgments and certain dismissals. See Okla. Sup. Ct. Rul. 1.36. The Rule provides for a collection and assembly of an appeal record. Minnis submitted a record which systematically excluded many of the filings of Munroe. Munroe filed a Supplementary Record.

Appeals are commenced by the filing of a Petition in Error, to which the opposing party is allowed to file a response. The Petition in Error will identify claimed errors. The Rule provides that the record is filed and no briefing is generally permitted under the Rule, but can be ordered by the court. Motions for leave to submit appellate briefs are deemed denied unless positively answered affirmatively. When cases are assigned to the Court of Civil Appeals, a motion to retain jurisdiction by the Supreme Court can be filed, all as provided by the Rule.

After the decision of the CCA affirming the trial court, Minnis filed Appellant's Petition for Rehearing and Brief in Support. The Rehearing Petition raised issues of (1) litigation by a stranger; (2) resolution of inter-tribal matters beyond the jurisdiction of the CCA, contrary to federal law, and unnecessary to a resolution of the suit; and (3) the application of sovereign immunity contrary to Oklahoma case law.

After the Petition for Rehearing was denied, Minnis filed a Petition for Certiorari with the Oklahoma Supreme Court which was denied. The Petition for Certiorari raised two questions: (1) litigation by a stranger and converting an order granting a motion to dismiss to summary judgment; and (2) deciding a question of substance involving the application of sovereign immunity and purporting to resolve inter-tribal matters beyond jurisdiction of the CCA and contrary to federal laws.

Minnis made no separate claim in the CCA or Oklahoma Supreme Court that it was denied due process and therefore any consideration of certiorari on this basis should be declined. See *Capitol Square Review Bd. v. Pinette*, *id.*

In any case, no due process was denied. Under the Oklahoma Supreme Court Rule, Minnis had significant opportunity to raise the claims it now presents.

CONCLUSION

Petitioner's suit is an action for fees against the Kaw Nation based upon an alleged waiver of sovereign immunity and confession of judgment signed by its clients. Even apart from such conflict of interest, the challenge of the validity of the sovereign immunity waiver by the Tribal Chairman and the General Council made the purported waiver equivocal.

Dismissal without prejudice to refiling in Tribal Court was not substituted judgment by the district court and the CCA of tribal matters, but was a referral by the state courts to a tribal forum that could determine the validity of the waiver of sovereign immunity and confession of judgment.

Finally, Guy Munroe was not a stranger to this litigation. He was authorized in his own right as Chairman and by Resolution of the Kaw General Council to enter the litigation and challenge Petitioner's collusive attempt at fee collection.

There is no error here and the Petition should be denied.

Respectfully submitted,

MICHEAL C. SALEM
Counsel of Record
SALEM LAW OFFICES
111 North Peters, Suite 100
Norman, OK 73069
(405) 366-1234

Attorney for Respondent

(3)

Supreme Court, U.S.
FILED
AUG - 9 2004
OFFICE OF THE CLERK

No. 03-1714

In The
Supreme Court of the United States

MICHAEL MINNIS & ASSOCIATES, P.C.,

Petitioner,

v.

KAW NATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of The State Of Oklahoma, Division No. III

REPLY TO BRIEF IN OPPOSITION

MICHAEL MINNIS
Counsel of Record
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
211 N. Robinson, Suite 501
Oklahoma City, OK 73102-7112
(405) 319-3500; Fax (405) 319-3509
E-Mail: mminnis@dsda.com

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Michael Minnis & Associates, P.C. ("MM&A") have petitioned for certiorari to review an opinion by the Oklahoma Court of Civil Appeals Division III. A review is sought because the Court of Appeals' opinion is contrary to federal tribal sovereign immunity jurisprudence and was entered in gross violation of MM&A's rights to due process guaranteed by the Fourteenth Amendment to the United States Constitution.

REPLY TO INTRODUCTION AND COUNTERSTATEMENT OF THE CASE

The Respondent (hereafter "Munroe"[1]) uses the first thirteen pages of his Brief in Opposition to recite a non-chronological[2] and irrelevant series of events. For the most part these events occurred after the filing of the MM&A petition. Because the case below proceeded to judgment based solely on the allegations in the petition, the only relevant facts are those alleged in the petition. The allegations in the petition are simple and straight forward.

1. MM&A had a written contract with the Kaw Nation (App. 27-28, ¶¶ 7-8).

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[1] MM&A sued the Kaw Nation. It did not sue Guy Munroe. However, the Kaw Nation has never entered an appearance in this litigation. Guy Munroe as Kaw Nation Chairman has asserted defenses to the suit. Munroe's lack of standing is one of the issues raised by MM&A. *See* Pet. at 17-18. The attorney filing the respondent's brief is Munroe's attorney.

[2] By omitting the dates, the events all appear to run together. The impact of events cannot be judged absent a chronology. For example, Munroe mentions Lujan's removal actions. Resp. Br. at 8. Lujan's purported removal of two Executive Council members (McCauley and Pepper) was not "ordered" until March 12, 2003. These alleged removals occurred after the members had voted to adopt the resolutions attached to the Petition. In any event, the BIA in an April 8th letter confirmed that the "Lujan removals" were invalid and that "the Kaw Executive Council is still composed", *inter alia*, of McCauley, Martha Spotted Bear, Clark Pepper, and Jesse Mehojah. App. 34-35.

2. Consistent with its contract, MM&A performed professional legal services for the Kaw Nation[3] and was monthly reimbursed for its services from February 2002 through August 2002. *Id.* at 28 (¶ 10).

3. When elected in September, Munroe blocked payment of MM&A invoices despite the directions of the Executive Council. *Id.* at 28 (¶¶ 10-11).

4. Thus, on December 12, 2002, the Executive Council adopted a resolution waiving sovereign immunity and authorizing suit in the Oklahoma County District Court to recover under the written contract. *Id.* at 27 (¶ 4); at 30-31.

5. MM&A brought suit to recover for services performed in September, October, November, and December of 2002 under the contract. *Id.* at 26, 28 (¶ 12).

6. The Kaw Nation Executive Council adopted a resolution acknowledging that the services were performed and that the sums were due and owing and authorizing confession of judgment. *Id.* at 38-41.

7. The vice chairman of the Kaw Nation, consistent with the resolution, appeared in open court and confessed judgment. *Id.* at 36-37.

No answer or other pleading was filed by the Kaw Nation. Guy Munroe filed a motion to dismiss. MM&A filed a motion for judgment. The district court denied the MM&A motion for judgment and granted Munroe's motion to dismiss based on MM&A's alleged failure to exhaust tribal remedies.

On appeal, the Oklahoma Court of Civil Appeals held that MM&A was not required to exhaust tribal remedies,

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[3] The Respondent's Brief is filled with false claims that MM&A represents "certain members of the Executive Council." *Id.* at 3; *see also id.* at 6 ("Four members of the Executive Council (EC4), who were and continue to be represented by Minnis."), 12 ("Minnis and the EC4"), 15 ("the EC4 members who are also individual clients of Minnis"). MM&A was employed by the Kaw Nation. MM&A's client is the Kaw Nation who acts through its Executive Council. The Executive Council quorum of four acts by majority vote. MM&A no more represents the four individuals than the United States Attorney represents the individual Congressmen who vote for laws defended by the United States Attorney.

but affirmed the dismissal order by converting the motion into summary judgment and finding suit barred by sovereign immunity.

Munroe suggests two possible sources of his authority to participate in litigation using his name but raising defenses on behalf of the Kaw Nation, *e.g.*, that Guy Munroe and the Kaw Nation are synonymous. First, he implies that as chairman he can speak and act for the tribe. Resp. Br. at 3 (the chairman "is a natural representative of the Nation and the Nation's interests"). Second, he claims to have specific authorization from the General Council. *Id.* at 16, 30. As the Secretary of Interior, by and through the Bureau of Indian Affairs ("BIA") officials and attorneys, has made clear, neither the chairman nor the General Council is constitutionally authorized to speak and act on behalf of the tribe. *See*, *e.g.*, Pet. at 10, n.8. This determination is manifest in the provisions of the Kaw Nation Constitution.

CHAIRMAN

> It shall be the duty of the Chairman to preside at all meetings of the General Council and Executive Council. The Chairman shall have general supervision of the affairs of the General Council and Executive Council and shall perform all duties pertaining to the office of chairman, including the authority to cause laws of the Kaw Nation to be faithfully executed and obeyed, and to carry out obligations entrusted to the office of Chairman.

KAW NATION CONST. art. III, § 2.

EXECUTIVE COUNCIL

> *Powers.* (a) The Executive Council shall serve as the legislative body of the Kaw Nation and **shall have the authority to act in and on all matters and subjects upon which the Tribe is empowered to act, now or in the future**, including, but not limited to, the following:
>
> 1. **To represent the Kaw Nation** and act in all matters that concern the health, peace, safety

and general welfare of the Nation and all persons within its territory, and to make decisions not inconsistent with or contrary to this constitution.

2. **To negotiate and make contracts** with Federal, tribal, state, and local governments, and with any individual, firm or company.

3. **To employ legal counsel**, the choice of counsel and fixing of fees to be subject of the approval of the Secretary of the Interior, or his authorized representative, so long as such approval is required by Federal law.[4]

4. To veto the sale, disposition, lease, or encumbrance of tribal lands, or interest in tribal lands, tribal funds, or other tribal assets which may be authorized by any agency or employee of the federal government.

5. To regulate and provide for permits, leases, and assignments of land for business, home site, and other purposes, and generally to provide for proper use a development of all tribal lands, natural resources, and other tribal property.

6. To regulate its own procedures, to appoint subordinate committees, commissions, boards, tribal officials, and employees not otherwise provided for in this constitution, to describe their salaries, tenure, and duties. Appointees may or may not be tribal members.

7. The authority to establish and describe rules for governing tribal courts and tribal law enforcement agencies and to provide for the maintenance of law and order on Kaw tribal lands.

8. To protect and preserve the wildlife and natural resources of the tribe; to regulate hunting, fishing, and trapping on tribal lands.

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[4] Because the Kaw Nation is participating in Self-Governance, Secretarial approval of attorney contracts is not required by law. 25 U.S.C. § 458cc(h)(2).

> 9. To levy and collect taxes; to regulate the conduct of business within the territory of the Kaw Nation; to charter public or private business, financial, and similar entities; and otherwise provide for the development of the economy within the territory of the Kaw Nation.
>
> The foregoing enumeration of power shall not be construed to limit the powers of the Kaw Nation and in no way shall be deemed an abdication or forfeiture of the Nation's inherent attributes of sovereignty and such powers may be exercised through the enactment of ordinances by the Executive Council.

Id. at art. II, § 4(a) (boldface added).

GENERAL COUNCIL

The only limitations on the Executive Council powers and, hence, the only nonelective[5] powers of the General Council are explained in Article 2.

> (b) The following enumerated actions of the Executive Council shall be of no effect until the General Council has approved them.
>
> 1. The sale, mortgage (except purchase money mortgages on the land being purchased), or other alienation of tribally owned lands. Leases entered into pursuant to Federal statute, revocable permits, and assignments under tribal law where legal or trust title of the Kaw Nation remains unaffected, are not alienations for purposes of this subsection.
>
> 2. The establishment, enactment, amendment, or repeal of ordinances respecting tribal elections or recall or removal of tribal officers.
>
> 3. The exercise of the tribal power of eminent domain.

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[5] The General Council elects members of the Executive Council. KAW NATION CONST. art. II, § 3.

> 4. The appointment of judicial officers, except for judicial officers of an intertribal court system authorized by Article V, Section 7(b) of this Constitution.
>
> 5. Pay increases of constitutional tribal officers if such raises are to be paid from tribal funds.
>
> Except as hereafter provided, Executive Council actions submitted under this section must be approved by a majority vote of the General Council at a properly called meeting before they have any force or effect. If the General Council fails to act on actions under this section in a properly called meeting for any reason, its approval shall be deemed to have been given if and only if a statement or notice that such action will be considered was included in the public notice of the meeting.

Id. at art. II, § 4(b).

Any rational review of the Kaw Nation Constitution clearly shows that the Executive Council speaks and acts for the tribe, that the General Council (just like the general electorate in the United States) has no power to hire attorneys, to claim to represent the Kaw Nation, or to authorize the chairman to do so. It is axiomatic that only one person or entity can "speak or act" for a government.

Munroe also suggests that the power of the Executive Council to act was precluded by "injunctions" entered by Phil Lujan who Munroe claims is a Kaw Nation District Judge. Resp. Br. at 7. The problem with this suggestion, as pointed out in the Petition and as the Secretary has noted several times,[6] is that these injunctions were issued when Lujan had not been confirmed as a district judge by the General Council and hence his pronouncements "are of no effect" even if he had the power to issue them which he clearly did not. One of the votes the Executive Council members were allegedly "enjoined" by Lujan from making was a vote on "any matter concerning the appointment or approval of . . . the

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[6] *See* Pet. at 11-12.

Judge of this Court." Pet. at 12. It is as if a nominee for the United States District Judge began acting as a judge before his nomination was confirmed and entered an order enjoining the President from withdrawing his nomination before it had been voted on by the Senate.

REPLY TO REASONS FOR DENIAL OF THE WRIT

Munroe's first argument is that MM&A's petition is premature because MM&A can file their suit in "the last agreed and undisputed forum," to-wit, the Kaw Nation Tribal Court. Resp. Br. at 19. This would be true if the district court dismissal without prejudice for failure to exhaust tribal remedies had merely been affirmed. However, the Court of Appeals held that MM&A did not have to exhaust tribal remedies, but instead converted the motion to dismiss *sua sponte* into a motion for summary judgment and determined that MM&A's action was barred by tribal sovereign immunity. Even if the Kaw Nation had a valid tribal court, the Court of Appeals decision that MM&A's suit is barred by sovereign immunity has precluded further litigation in any forum. When MM&A filed this suit, the Kaw Nation had no validly selected and confirmed district judge or Kaw Nation Supreme Court justices. Even though such a court may have been authorized, it was not available. Second, the person claiming to be a Kaw Nation district judge was clearly corrupt issuing *ex parte* orders at the request of Munroe that "instanter" enjoined a majority of the governing body from voting.

In response to MM&A's arguments that determinations by the Secretary are controlling, Munroe claims

these Secretarial decisions[7] were "overturned" (Resp. Br. at 12) by an administrative law judge for the Interior Board of Contract Appeals. The Administrative Law Judge only has jurisdiction over claims filed by a contracting party. 41 U.S.C. § 606; 43 C.F.R. § 4.101.[8] He clearly has no jurisdiction over internal tribal matters and no power to overturn Secretarial determinations about internal tribal matters. *United States v. Pawnee Business Council of Pawnee Indian Tribe of Okla.*, 382 F. Supp. 54, 58-59 (N.D. Okla. 1974). The Secretary vigorously challenged Munroe's authority to use the board of contract appeals to overturn a majority decision by a tribal governing body and to overturn Secretarial determinations of internal tribal disputes. Secretarial determinations are appealable but not to the board of contract appeals. Here Munroe did appeal the Secretarial determinations to the Interior Board of Indian

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[7] Munroe quotes from his own brief a claim that the "OSG and BIA apparently accepted at face value ["questionable assertions by the EC4 group"] without notice or investigation." Resp. Br. at 13. This is not an accurate representation of the record. A majority of the Executive Council voted to retrocede Self-Governance funding for the court system in November and December of 2002 and reported December 2 to the BIA that it could find no record that any of those claiming to be Kaw Nation judges or justices had been selected and confirmed as required by the Kaw Nation Constitution. On December 12th, the BIA wrote Munroe asking for documentation of the judicial appointments. In a December 20th letter, Munroe refused to provide the documentation. In a March 17, 2003, letter, the BIA announced it was reassuming jurisdiction over Kaw Nation Indian country effective February 28, 2003.

[8] Munroe states that the "BIA issued letter rulings indicating it would assume judicial authority of the Tribe" and then claims that he "appealed these decisions * * * to the Interior Board of Contract Appeals." Resp. Br. at 12. This is not accurate. Munroe did appeal "these [BIA] decisions" but not to the board of contract appeals. He appealed them to the Interior Board of Indian Appeals which dismissed the appeal. What Munroe appealed to the board of contract appeals was the Office of Self Governance decision to cut funding under the Annual Funding Agreement. Because the BIA "decisions" did not involve a contract, an appeal to the board of contract appeals would have been clearly improper. That the board of contract appeals "overturned the decisions of the OSG and BIA" (*id.*) is indicative of how far the board exceeded its jurisdiction.

Appeals[9] which dismissed his claim. The Secretary and the Kaw Nation (who the Administrative Law Judge refused to hear) have filed appeals. *Kaw Nation v. Secretary of Interior*, Nos. 04-1029 and 1077 (Fed. Cir.). In any event, the Administrative Law Judge's decision came long after MM&A filed its suit.

Munroe also argues that MM&A misstated the holding in *Citizen Band Potawatomi v. C&L Enterprises*, 532 U.S. 411 (2001). Resp. Br. at 23. Munroe apparently misunderstood MM&A's argument. In *Citizen Band*, this Court found language in an arbitration clause to be a clear and explicit waiver of sovereign immunity. MM&A's point is that this Court also implicitly acknowledged[10] that a majority of a tribal governing body could make such a waiver because C&L alleged in its petition that the arbitration clause was in a contract signed by 3 of the 5-member Business Committee.[11] The *Citizen Band* litigation involved a petition challenged by a tribe asserting sovereign immunity. C&L moved for judgment and the tribe moved for dismissal based on sovereign immunity. The Trial Court denied the tribe's motion and granted judgment for C&L. As MM&A argued, the facts showing waiver here are much stronger than those found to be valid in *Citizen Band*.

Finally, Munroe claims that MM&A did not properly raise the denial of due process. Munroe argues that MM&A "made no request for an evidentiary hearing after being given notice of the Court rule from the brief." Resp. Br. at 28. Why would MM&A request an evidentiary hearing on a

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[9] *See generally* 25 C.F.R. Part 2; *id.* § 2.3 (a) ("this part applies to all appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions.").

[10] "The question is whether the tribe has waived immunity." *Id.* at 418.

[11] *See, e.g., C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe*, 2002 OK 99, ¶ 14, 72 P.3d 1 ("the Tribe does not dispute . . . that Tribal officials executed it. Hence, the contractor's proof of the contract made a prima facie case. . . .").

motion to dismiss when such a motion under state law presumes that "all of the challenged pleading's allegations [are true] together with all reasonable inferences which may be drawn from them"? *Fanning v. Brown*, 2004 OK 7, ¶ 4, 85 P.3d 841, 844.

MM&A's claim of denial of due process is based on the refusal of the Oklahoma courts (District Court and Court of Civil Appeals) to litigate Munroe's standing and on the Court of Civil Appeals' *sua sponte* conversion of an order granting a motion to dismiss into summary judgment. MM&A consistently challenged Munroe's standing in every pleading it filed. MM&A challenged the denial of due process by the Court of Civil Appeals in its Petition for Certiorari to the Oklahoma Supreme Court asserting that converting an order granting a motion to dismiss into summary judgment violated MM&A's State statutory procedural laws and MM&A's due process rights.[12]

CONCLUSION

The opinion below is contrary to this Court's tribal sovereign immunity jurisprudence and to MM&A's rights guaranteed under the Fourteenth Amendment of the Constitution and should be reversed.

Respectfully submitted,

MICHAEL MINNIS
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
(Counsel of Record)
Attorneys for Petitioner
MICHAEL MINNIS & ASSOCIATES, P.C.

[12] *See, e.g., Michael Minnis & Associates, P.C. v. Kaw Nation*, No. 99,565 (Okla. Sup. Ct. 2004) (reply to answer to petition for certiorari of Michael Minnis & Associates, P.C. at 3).